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Promise-Induced False Confessions: Lessons from Promises in Another Context

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PROMISE-INDUCED FALSE CONFESSIONS: LESSONS FROM PROMISES IN ANOTHER CONTEXT

Abstract: People are generally skeptical that someone would falsely confess to a crime he or she did not commit. Nonetheless, a myriad of convicts exonerated by DNA and the rapidly emerging scientific literature on the subject calls into question this long-standing belief. Scholars in the field now recognize that personal and situational risk factors, including promises of leniency, heighten the risk of a false confession. Promises of leniency have been shown to be particularly coercive in interrogations and to produce unusually persuasive testimony in the courtroom. Due to a failure to recognize the power behind these promises, our justice system does not adequately safeguard criminal defendants who give promise-induced confessions. As such, federal appellate courts are in disarray over when a promise of leniency renders a confession inadmissible at trial. On the other hand, the power behind promises in the plea-bargaining context is better recognized by scholars and laypeople alike and our justice system consequently provides much greater safeguards to criminal defendants who plead guilty in response to a promise. This Note argues that jury instructions that help the jury better detect, understand, and weigh confession testimony can close the unwarranted gap between procedural safeguards governing promise-induced admissions of guilt during plea discussions and interrogations. This Note also proposes a model instruction, which conveys the relevant scientific and legal principles in a way that will impact jurors' verdicts in false confession cases.

INTRODUCTION

"They told me . . . 'You just go ahead and cooperate, and we'll let you go home.' I thought I was going home, but . . . I've been here ever since then."[1]

Calvin Ollins (Calvin), a fourteen-year-old with mental limitations, was one of four black men wrongfully convicted of the 1986 rape and murder of medical student Lori Roscetti in Chicago.[2] Late one night, the men

[1] THE MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, WHY CONFESS? CALVIN OLLINS (2006), http://www.adjj.org/downloads/9454Microsoft%20PowerPoint%20-%20Interrogation%20of%20Juveniles.pdf [https://perma.cc/FXL5-NFZY] [hereinafter MACARTHUR FOUND.] (quoting Calvin Ollins (Calvin) regarding his wrongful conviction and subsequent imprisonment).

[2] *Calvin Ollins*, NAT'L REGISTRY OF EXONERATIONS (May 6, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3445 [https://perma.cc/7V4P-TMUK]. Calvin had an IQ "between sixty-five and seventy." *See* Maurice Possley & Steve Mills, *New Evidence*

allegedly jumped into Roscetti's car as she was driving home and took her to an isolated area where they robbed, raped, and beat her until she died.[3] After investigating for several weeks without success, the police eventually brought Larry Ollins, Calvin's cousin, and Marcelus Bradford to the police station for questioning because they fit the racial description Roscetti provided, previously served jail time, and lived near the crime.[4] Following an intense interrogation, Bradford confessed to the murder and implicated Omar Saunders as well as both of the Ollins cousins, Larry and Calvin.[5] After five hours of interrogation during which interrogators threatened Calvin with violence and the death penalty, and promised to release him if he confessed, Calvin admitted his guilt.[6] At trial, the primary evidence against Calvin was his confession, Bradford's incentivized testimony, and a crime analyst's testimony about test results taken from semen found on Roscetti's vaginal swabs.[7] Calvin told the jury that he had admitted his guilt only after

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Stirs Doubt Over Murder Convictions; DNA, Recantations Suggest Four Inmates Innocent in '86 Case, CHI. TRIB., May 2, 2001, at N1 (quoting defense witnesses and Calvin's teachers). At trial, Calvin's teachers testified that he was only reading at the second-grade level. Hugh Dellios, *Youth Guilty in Assault, Murder of Med Student*, CHI. TRIB., June 21, 1988, at C1.

[3] *Calvin Ollins*, *supra* note 2. According to the trial court's findings of fact, at around 1:00 a.m. on February 24, 1988, Roscetti was on her way home from Rush University Medical School with a classmate. People v. Ollins (*Ollins I*), 601 N.E.2d 922, 923–24 (Ill. App. Ct. 1992). After dropping off her classmate, Roscetti proceeded to drive to her own apartment, but was apprehended by four men when she stopped at a stop sign. *Id.* A black man jumped in front of her car, and three others got into her car. *Id.* The perpetrators held Roscetti in the back of her car, drove her to an isolated railway access road, and then took her out of the car and assaulted her. *Id.* A railroad security guard discovered her body later that night. *Id.*

[4] *See* Welsh S. White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1022–24 (explaining the circumstances that led to Calvin's arrest and confession).

[5] *See id.* at 1022 (noting Marcellus Bradford confessed after being at the police station for over fifteen hours). According to Bradford's confession, they committed the egregious acts against Roscetti to get bus money for Calvin to get home. *Id.* at 1023.

[6] *See* Dellios, *supra* note 2 (reporting on the promise and threats that were made throughout Calvin's 5-hour long interrogation).

[7] White, *supra* note 4, at 1023–24; Possley & Mills, *supra* note 2. Marcellus Bradford pleaded guilty in 1988 and agreed to testify for the prosecution at the other three men's trials in exchange for a reduced sentence. Possley & Mills, *supra* note 2. At Calvin's trial, the analyst testified that the tests she ran on a vaginal swab from Roscetti confirmed that the semen found at the crime scene was from a "secretor," meaning a person whose blood type could be determined from saliva and other body secretions, not just from their blood. *Id.* According to the Chicago police crime lab's own tests, which were given to the police and prosecutors before trial, however, the four teens were all non-secretors. *Id.* The defense failed to highlight this at trial. *Id.* The analyst did admit at that trial the results of the test were "consistent with thirty-seven percent of the United States male population," and the defense argued they lacked probative value on those grounds. *Ollins I*, 601 N.E.2d at 924. It is not uncommon for the defense to underutilize scientific evidence or fail to properly rebut it as they did in Calvin's case because many defendants cannot afford to hire expert witnesses. *See* STEVEN K. SMITH & CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS: INDIGENT DEFENSE 1 (Feb. 1, 1996), https://www.bjs.gov/content/pub/pdf/id.pdf [https://perma.cc/Y85E-8XY3] (finding, in 1991, that about three-quarters of state prison inmates and half of federal prison inmates were indigent); *see also* Paul C. Giannelli, Ake

detectives promised him he would be released and allowed to go home if he confessed.[8] Nonetheless, the jury convicted him of murder, aggravated sexual assault, and aggravated kidnapping.[9] After spending more than thirteen years in prison, Calvin was released when DNA tests in 2001 proved he could not have been the perpetrator.[10] Despite this positive ending, Calvin's conviction placed him behind bars for almost half of his life as punishment for a crime that he did not commit.[11] Unfortunately, Calvin's story is not unique because promises of leniency continue to elicit false confessions that end in grave miscarriages of justice.[12]

A confession, like the one Calvin provided, is defined by 18 U.S.C. § 3501 and criminal law scholars as an admission of guilt to a criminal act, or a self-incriminating statement.[13] Confessions are typically accompanied by a

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v. Oklahoma*: The Right to Expert Assistance in a Post*-Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1305, 1312–13 (2004) (finding judges typically deny indigent defendants' requests for expert witness and investigator fees).

[8] *See* People v. Ollins (*Ollins II*), 606 N.E.2d 192, 202 (Ill. App. Ct. 1992) (holding that the trial court properly found Calvin's statements voluntary despite his claim that he made them because the police promised him he could go home if he cooperated); Dellios, *supra* note 2 (reporting on the circumstances surrounding Calvin's confession); MACARTHUR FOUND., *supra* note 1 (reporting on Calvin's belief that his confession would be rewarded with release).

[9] *Ollins II*, 606 N.E.2d at 195. Calvin was sentenced to natural life for murder with concurrent sentences of thirty years for sexual assault and fifteen years for aggravated kidnapping. *Id.*

[10] *Calvin Ollins*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/calvin-ollins/ [https://perma.cc/PAT4-L4WE] [hereinafter INNOCENCE PROJECT]. DNA tests on spermatozoa and hairs found on Roscetti's body and in her car excluded all four men as the perpetrators. *Id.* Following these DNA tests and Bradford's recantation, all three convicted men were released. *Meet the Exonerees, Wrongful Convictions of Youth: Larry Ollins*, BLUHM LEGAL CLINIC, NW. PRITZKER SCH. OF LAW, http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/exonerated/index.html?details=12 [https://perma.cc/R36L-E6DF].

[11] INNOCENCE PROJECT, *supra* note 10.

[12] *See DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [http://perma.cc/JN9E-ULGW] (aggregating statistics regarding false confession cases); *see also* Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 382 (2007) (noting newfound skepticism evoked by DNA evidence toward police interviewing and interrogation processes). These DNA exonerations are telling, but do not account for the likely existence of many undiscovered wrongful convictions based on false confession testimony. *See* Richard A. Leo, *False Confessions: Causes, Consequences and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 333 (2009) (highlighting unknown false confession statistics due to undiscovered cases and difficulty proving a confession's falsity with absolute certainty).

[13] *See* 18 U.S.C. § 3501(e) (2012) (providing a statutory definition of "confession"); Saul M Kassin et al., *Police Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 5 (2010) (defining confession). *Black's Law Dictionary* provides a narrower definition of a confession by distinguishing between confessions and admissions. *See, e.g.*, Steven A. Drizin & Richard. A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 892 n.1 (2004) (citing *Black's Law Dictionary* and discussing the difference between its definitions of confessions and admissions). *Compare Admission*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining an admission as "an acknowledgement of a fact or facts tending to prove guilt which falls short of an acknowledgement of all essential elements of the crime"), *with Con-*

narrative of how and why the crime occurred.[14] As one scholar remarked, and as many cases like Calvin's demonstrate, "the introduction of a confession makes the other aspects of a trial in court superfluous."[15] Confessions are characterized as the "most damaging type of evidence," a "prosecutor's most potent weapon," and so convincing that juries will commonly convict without any additional evidence of guilt.[16] The evidentiary power of confessions comes in part from the widespread doubt that anyone would admit to a crime they did not commit.[17] Yet, the fallibility of confessions continues to come to light as post-conviction DNA testing has now exonerated over 354 convicts, twenty-eight percent of whom falsely confessed.[18] These exonerations only represent a fraction of false confession cases that were conducive to DNA

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fession, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a confession as a "statement admitting or acknowledging all facts necessary for conviction of a crime").

[14] *See* Kassin et al., *supra* note 13, at 5 (detailing the different parts of a confession); Leo, *supra* note 12, at 333 (explaining elements of a confession). The post-admission narrative can transform a bare statement of "I did it" into a rich and compelling story of guilt. *See* Kassin et al., *supra* note 13, at 4 (explaining the post-admission narrative typically provides a basis for conviction). It is not only the narrative's rhetorical force that adds to the confession's power; its content can have an even greater effect on the fact-finder. Leo, *supra* note 12, at 337. Many exonerees' narratives included detailed and accurate information, which could not have been known by an innocent person but was likely disclosed during the interrogation process. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1053 (2010) (reviewing false confession testimony of DNA exonerees and concluding innocent suspects are informed of public and nonpublic facts of the crime).

[15] CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 221 (1997).

[16] Kassin, *supra* note 15, at 221; Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & HUM. BEHAV. 469, 481 (1997). *See generally* ALFRED COHN & ROY UDOLF, THE CRIMINAL JUSTICE SYSTEM AND ITS PSYCHOLOGY (1979) (explaining that confession testimony, even when it is retracted, is the most damaging type of evidence). Innocent people are often convicted because of their false confessions, even when the rest of the case against them is weak and the confession itself is questionable. *See* Fernanda Santos, *DNA Evidence Frees a Man Imprisoned for Half His Life*, N.Y. TIMES (Sept. 21, 2006), http://www.nytimes.com/2006/09/21/nyregion/21dna.html [https://perma.cc/C2N9-BWZM] (reporting on circumstances surrounding Jeffrey Deskovic's conviction and exoneration). In a 1998 study of sixty false confessions, seventy-three of the false confessors whose cases went to trial were wrongly convicted. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 482 (1998). In a 2004 study of 125 false confessions, eighty-one percent of the false confessors whose cases went to trial were wrongfully convicted. Drizin & Leo, *supra* note 13, at 960.

[17] *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 835, 867 (2d ed. 1923) (remarking that false confessions almost never occur and any reports of false confessions have not been properly authenticated).

[18] *DNA Exonerations in the United States*, *supra* note 12; *see* Kassin et al., *supra* note 12, at 382 (noting the newfound interest in studying police interviewing and interrogation processes that accompanied DNA exonerations). 51% of the false confessors were twenty-one years old or younger at the time of arrest, 35% of the false confessors were eighteen years old or younger at the time of arrest, and 10% of the false confessors had mental health or mental capacity issues. *DNA Exonerations in the United States*, *supra* note 12.

testing (typically rapes and murders), but still expose a telling pattern of error.[19]

Part I of this Note discusses the science behind why suspects falsely confess and why promises of leniency are particularly coercive in an interrogation and produce persuasive testimony in the courtroom.[20] It also explores the procedural constraints governing the admissibility of confession testimony and the disarray among federal appellate courts in applying them to confessions produced by promises of leniency.[21] Part II of this Note explores the more commonly understood coercive effect of promises of leniency in the context of plea bargaining and the corresponding heightened procedural safeguards protecting defendants who plead guilty.[22] Part III of this Note argues that jury instructions can close the gap between procedural safeguards governing promise-induced admissions of guilt during plea discussions and interrogations.[23]

I. PROMISE-INDUCED CONFESSIONS

Following the reliance on post-conviction DNA testing in the 1990s, the empirically demonstrated risk factors shown to be associated with people, like Calvin, who confess to crimes they did not commit, have become better researched and understood by experts in the field.[24] Although the reasons are complex and diverse, many false confessors tend to believe that admitting they committed the crime in question will be more beneficial than continuing to maintain their innocence.[25] Section A of this Part explains the science behind false confession testimony.[26] Section B of this Part focuses on the procedural constraints that govern confessions.[27]

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[19] *See* Leo, *supra* note 12, at 333 (highlighting the uncertainty of false confession statistics due to undiscovered cases and difficulty establishing a confession's falsity with absolute certainty). The ability to study the causes, patterns, and consequences of wrongful convictions involving false confessions was largely made possible by the advent of DNA testing, which established factual innocence to a certainty in numerous cases. *Id.* Due to this empirical limitation, this Note addresses cases involving serious charges. *See id.*

[20] *See infra* notes 32–102 and accompanying text.

[21] *See infra* notes 103–126 and accompanying text.

[22] *See infra* notes 133–172 and accompanying text.

[23] *See infra* notes 177–231 and accompanying text.

[24] Kassin et al., *supra* note 12, at 382; Leo, *supra* note 12, at 333 (identifying possible errors during interrogation).

[25] *False Confessions or Admissions*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/false-confessions-admissions/ [https://perma.cc/CR9M-NFZ3].

[26] *See infra* notes 32–102 and accompanying text.

[27] *See infra* notes 103–126 and accompanying text.

A. False Confession Science

There has been significant research on the science behind the causes and effects of false confessions.[28] Section 1 presents the procedures that law enforcement officers use to obtain confessions.[29] Sections 2 and 3 detail the situational and personal risk factors that heighten the chances of a false confession and subsequent wrongful conviction.[30] And finally, Section 4 clarifies why confessions that were produced by promises of leniency prove especially persuasive at trial.[31]

1. Law Enforcement Interrogation Procedures

Officers investigating crimes typically acquire confessions from suspects through an often critiqued multi-step process.[32] Each step is designed to elicit a confession from a guilty suspect, but creates a risk of mistakes that increase the possibility of a false confession and subsequent wrongful conviction.[33] In the 1930s, a report authored by the National Commission on Law Observance and Enforcement as well as several Supreme Court decisions shifted interrogation tactics away from physical coercion and towards psychological deception.[34] The Reid Technique, as set forth by the

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[28] *See, e.g.*, Leo, *supra* note 12, at 333.

[29] *See infra* notes 32–49 and accompanying text.

[30] *See infra* notes 50–69 and accompanying text.

[31] *See infra* notes 70–102 and accompanying text. All members of law enforcement, which can include police, interrogators, detectives, as well as other officials, can be referred to as "officers" for simplicity. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 270, 291 (1996) (using "officers" to refer to interrogators and detectives).

[32] *See* Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. PSYCHIATRY & L. 9, 20 (2010) (addressing the flawed processes used in interrogations that induce false confessions); *see also* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 36 (2004) (scrutinizing the interrogation methods commonly employed by officers).

[33] Leo, *supra* note 12, at 333.

[34] *See* Mark Costanzo & Allison Redlich, *Use of Physical and Psychological Force in Criminal and Military Interrogations*, *in* POLICING AROUND THE WORLD: POLICE USE OF FORCE 43, 43–51 (Joseph B. Kuhns & Johannes Knuttsson eds., 2010) (commenting on interrogation techniques before the 1930s); Kassin et al., *supra* note 13, at 6 (noting the most common "third-degree" tactics); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 38 (1992) (commenting on the development of interrogation techniques). The most common third-degree tactics in the late nineteenth century were physical violence (e.g., beating, kicking, or mauling suspects), torture (e.g., simulating suffocation by holding a suspect's head in water, putting lighted cigars or pokers against a suspect's body), prolonged incommunicado confinement, deprivations of sleep, food, and other needs, and extreme sensory discomfort (e.g., forcing a suspect to stand for hours on end, shining a bright, blinding light on the suspect). Kassin et al., *supra* note 13, at 6. The National Commission on Law Observance and Enforcement (also known unofficially as the Wickersham Commission) was a committee established in 1932 by then U.S. President Herbert Hoover. James D. Calder, *Between Brain and State: Herbert C. Hoover, George W. Wicker-*

leading manual on police interrogations, now advises officers to begin by making demeanor-based judgements in a pre-interrogation interview to decide whether a suspect is being truthful.[35] This step is intended to ensure that only guilty suspects who dishonestly maintain otherwise are further interrogated while innocents are released.[36] As people are typically poor at detecting lies, this crucial determination is easily decided incorrectly.[37]

Next, officers issue *Miranda* warnings to inform suspects of their constitutional rights to silence and counsel.[38] After *Miranda* warnings are issued, officers employ a guilt-presumptive interrogation with coercive techniques.[39] The Reid Technique advises officers to apply pressure while simultaneously insinuating that there are benefits to confessing.[40] By supposedly successfully determining guilt in the pre-interrogation interview, officers

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sham, and the Commission That Grounded Social Scientific Investigations of American Crime and Justice, *1929–1931 and Beyond*, 96 MARQ. L. REV. 1035, 1037 (2013).

[35] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 22 (2011). The Reid Technique manual was originally authored by Fred Inbau and John Reid in 1962 and is now in its fifth edition. *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS (2011). The Reid Technique employs strategies designed to overcome the resistance of suspects presumed guilty by isolating the suspect, and then subjecting him or her to a nine-step process full of positive and negative reinforcement. Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 112, 113–14 (2014).

[36] *See* Deborah Davis & William C. Follette, *Rethinking Probative Value of Evidence: Best Rates, Intuitive Profiling and the Postdiction of Behavior*, 26 L. & HUM. BEHAV. 133–58 (2002) (explaining the probative value of intuitively profiling suspects); Kassin & Gudjonsson, *supra* note 32, at 36 (scrutinizing commonplace interrogation methods). Some scholars in the field refer to officers' erroneous decision that an innocent person is guilty as the "misclassification error." Leo, *supra* note 12, at 333–34.

[37] Leo, *supra* note 12, at 334. In one study, police were not only less accurate than laypeople at judging whether confessions were true or false, they were also biased toward perceiving confessions as true confessions and overconfident despite their inaccuracy. Saul M. Kassin et al., *"I'd Know a False Confession If I Saw One": A Comparative Study of College Students and Police Investigators*, 29 L. & HUM. BEHAV. 211, 221–22 (2005). Moreover, training does not meaningfully improve performance compared with naïve control groups. *Id.* A wide variety of studies demonstrate that a person's ability to detect a lie does not depend on whether the speaker's motivation to evade detection was high or low, whether the truths and lies were accompanied by high or low levels of emotion, or whether they were told in a monologue, a social interaction, or a face-to-face interview. Maria Hartwig & Charles F. Bond, Jr., *Lie Detection from Multiple Cues: A Meta-Analysis*, 28 APPLIED COGNITIVE PSYCHOL. 661, 661–76 (2014).

[38] U.S. CONST. amend. V; *see* Miranda v. Arizona, 384 U.S. 436, 471 (1966) (holding that law enforcement officials must advise a suspect interrogated in custody of his or her rights to remain silent and to obtain an attorney based on a reading of the Fifth Amendment right against self-incrimination).

[39] Kassin & Gudjonsson, *supra* note 32, at 42. Although some amount of pressure is typical, scholars in the field refer to officers' *excessive* use of manipulation as the "coercion error." Leo, *supra* note 12, at 334–35.

[40] *See generally* INBAU ET AL., *supra* note 35; *see also* GARRETT, *supra* note 35, at 22 (explaining the Reid Technique and its nine stages); Kassin, *supra* note 35, at 113–14 (explaining the Reid Technique and its coercive nature).

theoretically avoid interrogating innocent suspects entirely.[41] Even if innocent suspects were subjected to interrogation, the authors of these coercive methods claim they could not induce an innocent suspect to falsely confess.[42]

A suspect's encouraged confession is often contaminated by a shaping of their post-admission narrative.[43] Although the Reid Technique and other police training emphasize avoidance of disclosing key facts in order to properly test a suspect's knowledge, many false confessors have volunteered information relating to the crime that only the perpetrator or officers could have known first-hand.[44] For example, during seventeen-year-old Jeffrey Deskovic's interrogation for the rape and murder of his classmate, he drew an accurate and detailed diagram that depicted the three different crime scenes, which were unknown to the public.[45] He also described how he delivered a blow to the victim's temple, tore her clothes, and suffocated her.[46] He was convicted in 1990, but exonerated by DNA evidence after serving 15 years in jail.[47] Similarly, Calvin reported that detectives brought him a statement that had been written for him, which they made him continuously repeat.[48] According to Calvin, "[t]hey basically gave me their own idea, their own picture, of exactly what took place at the crime scene—everything from point A to point B."[49]

2. Situational Risk Factors

In addition to the overarching risks introduced by these sequential steps, the presence of more specific situational factors throughout their implementation can also intensify the danger of a false confession.[50] First, the use or threat of physical punishment, such as violence or deprivation of food or sleep, can contribute to the risk of an innocent suspect confessing.[51]

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[41] Deborah Davis & Richard A. Leo, *The Problem of Interrogation-Induced False Confession*, *in* HANDBOOK OF FORENSIC SOCIOLOGY AND PSYCHOLOGY 47, 52 (Stephen J. Morewitz & Mark L. Goldstein eds., 2014). *See generally* INBAU ET AL., *supra* note 35.

[42] Davis & Leo, *supra* note 41, at 52. *See generally* INBAU ET AL., *supra* note 35.

[43] Garrett, *supra* note 14, at 1053 (studying contaminated false confessions); Leo & Davis, *supra* note 32, at 32 (explaining how the post-admission narrative is shaped).

[44] Garrett, *supra* note 14, at 1053; *see* GARRETT, *supra* note 35, at 20 (reporting that in ninety-five percent (thirty-eight out of forty cases) of false confessions studied, suspects volunteered non-public details about the crime they could only have learned from law enforcement's disclosures).

[45] Garrett, *supra* note 14, at 1055.

[46] *Id.*

[47] *Id.* at 1056.

[48] Possley & Mills, *supra* note 2.

[49] *Id.*

[50] *See* Leo & Davis, *supra* note 32, at 20 (explaining the stages of false confessions in the criminal justice system).

[51] *See* Brown v. Mississippi, 297 U.S. 278, 283 (1936) (focusing on a suspect's physical discomfort as the motivation behind his choice to confess); *see, e.g.*, Arizona v. Fulminante, 499 U.S.

Second, the anxiety associated with the custody and isolation itself is also a physical risk factor.[52]

The mentally coercive methods used during verbal confrontation also magnify the likelihood that an innocent suspect will confess.[53] Thus, the implementation of psychological interrogation techniques believed to overcome suspects' volition by causing them to believe they have no choice but to comply with orders is a third situational risk factor.[54] Officers can cause this effect by making inculpatory allegations, interrupting the suspect's refutation, ignoring objections, and citing either real or contrived evidence.[55] Fourth, the men-

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279, 286 (1991) (concluding that a government threat that a prisoner was in danger from fellow inmates if he did not confess induced that prisoner's confession); Greenwald v. Wisconsin, 390 U.S. 519, 520–21 (1968) (concluding that an officer's denial of food and high blood pressure medicine induced a suspect's confession); Payne v. Arkansas, 356 U.S. 560, 567 (1958) (concluding that an officer's threat of angry mob of thirty to forty people outside jailhouse that would harass prisoner if he did not confess induced a prisoner's confession); Malinski v. New York, 324 U.S. 401, 405, 407 (1945) (concluding that an officer bringing a suspect to a hotel and stripping him down induced the suspect's confession); United States v. Murphy, 763 F.2d 202, 202, 204 (6th Cir. 1985) (finding that a bank robbery suspect, who confessed after being bitten and dragged by a police dog, confessed so that officers would call the dog off); GARRETT, *supra* note 35, at 38 (explaining that the threat or use of physical violence can induce a suspect to confess).

[52] Kassin & Gudjonsson, *supra* note 32, at 53. During an interrogation, suspects are often removed from their familiar surroundings and questioned at a police station. *See id.* This practice can lead to anxiety in the suspect because it promotes feelings of uncertainty about the future, lack of control, lack of autonomy, leaves him or her without an ally in the room, and enables police to make claims that are difficult for the suspect to challenge. *See* Costanzo & Redlich, *supra* note 34, at 43–51 (explaining the anxiety associated with being in custody); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 731 (1997) (arguing that in some known false confession cases, police use anxiety produced by isolation to invoke the suspects' worries about their family members to induce confessions). Furthermore, such anxiety increases a suspect's incentive to escape the interrogation over time. Kassin & Gudjonsson, *supra* note 32, at 53 (*citing* Philip G. Zimbardo, *The Psychology of Police Confessions*, 1 PSYCHOL. TODAY 17, 17–20, 25–27 (1967)). Long periods of isolation are often accompanied by fatigue, which can increase a suspect's vulnerability to influence and negatively affect his or her ability to make rational decisions. *Id.* Although police interrogations usually last two hours or less, one study reported the mean interrogation time in documented false confession cases was 16.3 hours with 34% of interrogations lasting six to twelve hours and 39% of interrogations lasting twelve to twenty-four hours. Drizin & Leo, *supra* note 13, at 948.

[53] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 980, 1001–77, 1117 (1997) (explaining the rational decisionmaking process of suspects who falsely confess under psychological pressure). *See generally* Saul Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233 (1991) (studying impact of implied promises and threats on suspects' decision to falsely confess and jurors' verdicts).

[54] Drizin & Leo, *supra* note 13, at 912–14 (referring to the process by which the interrogator exaggerates the strength of the evidence and the magnitude of the charges to limit a suspect's perceived options as "*maximization*"); Ofshe & Leo, *supra* note 53, at 1001–77, 1117 (explaining rational decisionmaking process of suspects who falsely confess under psychological pressure).

[55] *See* Kassin, *supra* note 35, at 113–14 (explaining officers' coercive methods used to convey their belief in suspects' guilt and futility of suspect's denial).

tally coercive introduction of consequences through promises and threats increases the probability of inducing an innocent suspect's confession.[56] According to rational choice theory, the combination of these abuses, perceived as limited options and consequences, result in suspects' deciding that it is more beneficial to confess than maintain innocence.[57] This type of confession is referred to as a "coerced-compliant" confession.[58]

Promises of leniency, such as an officer's assurance that he will recommend a lighter sentence, are particularly coercive in leading a suspect to believe the only way to reduce or escape punishment is to confess.[59] Psychological research indicates that suspects take promises seriously because they assume their interrogator has superior knowledge and experience concerning the consequences of confessing.[60] Furthermore, cognitive and linguistic research has found that express and implied promises are equivalent in their coercive impact because people often recall information beyond what was blatantly said, and instead process information "between the lines."[61] These two findings, taken together, lead suspects to reasonably rely on their interrogators' implicit or explicit assurances when they calculate whether confessing would be more beneficial than maintaining their innocence.[62]

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[56] Drizin & Leo, *supra* note 13, at 917. In most false confession cases, interrogators communicate either explicitly or implicitly that the suspect will receive more lenient treatment if he or she confesses and harsher treatment if he or she does not. *See* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 249, 250 (2008) (referring to the process by which an interrogator explicitly or implicitly offers leniency to downplay the seriousness of an offense as "*minimization*"). These promises of leniency can take the form of offers of outright release from custody, counseling instead of prison, or reduced charges, whereas promises of punishment include threats of longer prison statements, the death penalty, or harm to family members. Drizin & Leo, *supra* note 13, at 917.

[57] Ofshe & Leo, *supra* note 53, at 1001–77, 1117 (explaining that suspects become persuaded that resistance is either futile or not worth its costs).

[58] Kassin, *supra* note 35, at 114 (defining "coerced-compliant" false confessions as an innocent person knowingly confessing as an act of behavioral compliance). In contrast, a "coerced-internalized" false confession occurs when an innocent suspect is exposed to deceptive claims about the evidence, becomes confused, questions his or her innocence, infers his or her own guilt, and sometimes even develops false memories in support of that inference. *Id.*

[59] Kassin et al., *supra* note 13, at 29 (explaining effect of promises of leniency on suspects' rational choices).

[60] *See* Leo & Davis, *supra* note 32, at 35 (arguing suspects give serious weight to an interrogator's arguments and implications regarding why confessions will result in greater leniency).

[61] *See* Kassin & McNall, *supra* note 53, at 235, 248 (presenting a study on the impact of implied promises on suspects' decision to falsely confess and finding implied and explicit promises are equally coercive).

[62] *See* Ofshe & Leo, *supra* note 53, at 1001–77, 1117 (explaining suspects' rational decision-making during interrogations).

3. Personal Risk Factors

A suspect's personal attributes also contribute to his or her vulnerability in making a false confession.[63] Due to psychological characteristics, some people are more likely than others to respond with compliance or suggestibility when confronted with the aforementioned coercive interrogation methods.[64] These psychological characteristics include mental disorders, abnormal mental states, low intellectual functioning, and certain personality traits.[65] Status as a juvenile similarly magnifies a suspect's susceptibly to making false confessions because of youths' intellectual vulnerability and simple-minded understanding of promises and threats.[66] Finally, innocence itself can contribute to a suspect's inclination to confess because innocents often believe their actual innocence will eventually prevail, they trust the criminal justice system, or they believe in a just world in which people get what they deserve.[67]

False confessions are ultimately a product of unduly coercive techniques used by law enforcement and personal attributes that increase a sus-

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[63] *See* Kassin & Gudjonsson, *supra* note 32, at 51 (explaining individual characteristics unique to the suspect that can heighten the chances of a false confession).

[64] *Id.*; *see* J. Pete Blair, *The Roles of Interrogation, Perception, and Individual Differences in Producing Compliant False Confessions*, 13 PSYCHOL. CRIME & L. 173, 173, 183 (2007) (finding interrogation tactics alone explained only a trivial amount of variance, whereas perceptions and individual differences each explained significant amounts of the variance in false confessions).

[65] *See* Gisli H. Gudjonsson, *Psychological Vulnerabilities During Police Interviews. Why Are They Important?*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 161, 167 (2010) (arguing that there are typically four types of psychological vulnerabilities relevant to the psychological or psychiatric evaluation of suspects in criminal cases). These vulnerabilities have been labeled "mental disorder" (i.e., mental illness, learning disabilities, personality disorder), "abnormal mental state" (e.g., anxiety, mood disturbance, phobias, bereavement, intoxication, or withdrawal from drugs or alcohol), "intellectual functioning" (e.g., borderline IQ scores), and "personality" (e.g., suggestibility, compliance, and acquiescence). *Id.*

[66] Kassin & Gudjonsson, *supra* note 32, at 52; *Why Are Youth Susceptible to False Confessions?*, INNOCENCE PROJECT (Oct. 16, 2015), https://www.innocenceproject.org/why-are-youth-susceptible-to-false-confessions/ [https://perma.cc/537X-KWYD]. In one study, participants of varying age groups were led to believe they crashed a computer when in fact they had not, and results showed that younger participants were more likely to admit guilt. *See generally* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141 (2002) (presenting study on juveniles' vulnerability to make false confessions). In 2013, the National Registry of Exonerations reported that of all the exonerations of youth in the past twenty-five years, thirty-eight percent involved false confessions. *Why Are Youth Susceptible to False Confessions?*, *supra*.

[67] *See* Kassin, *supra* note 56, at 251 (finding innocence heightens risk of false confession); Saul Kassin & Rebecca Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 218 (2004) (explaining why innocence heightens risk of falsely confessing). Other studies suggest innocents' vulnerability may also stem from people commonly overestimating how visible their true thoughts and emotions are to others. *See* Tomas Gilovich et al., *The Illusion of Transparency: Biased Assessments of Others' Ability to Read One's Emotional States*, 75 J. PERSONALITY & SOC. PSYCHOL. 332, 333–34 (1998) (finding people overestimate the ability of others to detect their emotional state).

pect's vulnerability to such pressure.[68] But this list of situational and personal risk factors is not exhaustive, nor do these factors operate independently from one another.[69]

4. Persuasiveness of Promise-Induced Confessions in the Courtroom

Despite the demonstrated fallibility of confessions, such evidence remains extremely influential in the courtroom.[70] For example, studies show that confessions have more impact than other forms of powerful evidence such as eyewitness and character testimony.[71] Confessions produced by promises of leniency in particular ascertain their strength from the public's inability to detect, comprehend, and properly weigh such promises.[72]

First, it is often difficult to recognize the existence of a promise of leniency.[73] For example, the common use of implied promises of leniency, rather than explicit ones, makes the circumstances of interrogation that give rise to inadmissible confessions difficult to detect.[74] A confession will be inadmissible at trial when it was coerced and not the product of the suspect's free will.[75] Yet coercion is much easier to identify when an officer explicitly assures a suspect that he will receive a specific benefit for his confession rather than merely hints that his confession will be generally

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[68] Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 517.

[69] *See* Kassin, *supra* note 35, at 114 (listing interactive factors contributing to suspects' vulnerability); Kassin & Gudjonsson, *supra* note 32, at 56 (same); Johnson, *supra* note 52, at 728 (same).

[70] *See* Kassin & Gudjonsson, *supra* note 32, at 56 (studying the persuasive power of false confessions at trial).

[71] *Id*. at 57; *see* Kassin & Neumann, *supra* note 16, at 481 (conducting mock jury studies to evaluate the comparative impact of confession evidence and finding confession evidence raised the conviction rate more than eyewitness testimony or character evidence).

[72] *See* Kassin & McNall, *supra* note 53, at 234, 248 (finding direct promises are more often excluded than implied promises because they are easier to identify); *see also* Kassin, *supra* note 15, at 228–29 (commenting on the general population's inability to understand the coercive effects associated with promises of leniency); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 82–83 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (remarking on laypersons' difficulty in discounting confessions induced by promises of leniency).

[73] *See* Kassin & McNall, *supra* note 53, at 234, 248 (finding that judges much more frequently exclude confessions produced by direct promises than implied promises); Leo et al., *supra* note 68, at 530 (reporting on the difficultly of assessing what an officer said to a suspect in the absence of a full recording of the interrogation).

[74] *See* Kassin & McNall, *supra* note 53, at 234, 248 (finding that judges much more frequently exclude confessions produced by direct promises than implied promises).

[75] *See* Leo et al., *supra* note 68, at 496 (explaining the admissibility of confessions); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 867–69 (1981) (analyzing the development of the Supreme Court's due process "voluntariness" test).

beneficial.[76] For example, in *State v. Jackson*, the North Carolina Supreme Court ruled that the defendant's confession was not coerced in part because he was not explicitly promised a lighter sentence, even though the defendant was reassured that if he confessed the court would view him as cooperative.[77] Furthermore, implicit promises also allow involuntary confessions to be admitted at trial because their precise language is more easily forgotten.[78] Both officers and defendants generally have understandable difficulty remembering the exact dialogue of an interrogation, and thus are unable to adequately articulate what gave rise to a suspect's justified inference at a suppression hearing.[79]

Unfortunately, even explicit promises often do not make it on the record, and are thus similarly imperceptible to juries.[80] For example, Calvin's Court Reported Statement chronicles his post-admission narrative in response to an officer's series of questions, but does not include the initial promises used to elicit Calvin's original confession.[81] Therefore, even where a promise was made explicitly, there may be a sharp disagreement at trial between the defendant and the officer over what was said that can obscure the existence of that promise to a jury.[82] This credibility battle is further exacerbated by the situation faced by the defense attorney who must persuade the jury that the defendant is unreliable enough to have signed a

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[76] *See* Leo et al., *supra* note 68, at 496 (explaining the admissibility of confessions); Kassin & McNall, *supra* note 53, at 234, 248 (studying implicit promises).

[77] State v. Jackson, 304 S.E.2d 134, 150, 153 (N.C. 1983), *overruled on other grounds by* Griffith v. Kentucky, 479 U.S. 314 (1987), *as recognized in* State v. Abbott, 358 S.E.2d 365, 369 (N.C. 1987).

[78] Ofshe & Leo, *supra* note 53, at 1121.

[79] *See id.* (explaining how subtlety of implicit promise language poses challenge to human memory). This difficulty is exacerbated by the infrequency of videotaping interrogations. Johnson, *supra* note 52, at 720.

[80] *See* GARRETT, *supra* note 35, at 28 (finding none of the interrogations of exonerees who falsely confessed were recorded in their entirety); Garrett, *supra* note 14, at 1054–55 (finding one exoneree who falsely confessed was subjected to several hours of interrogation throughout multiple sessions, but officers only used a recorder in one session, periodically turned it on and off, and ultimately only recorded 35 minutes); Johnson, *supra* note 52, at 720 (finding officers rarely record interrogations); Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 5 (1992) (finding it rare that an entire interrogation is recorded).

[81] Statement of Calvin Ollins to Chicago Police re: Investigation of the Fatal Beating and Sexual Assault of Lori Roscetti, at 1–11 (Jan. 26, 1987), https://www.convictingtheinnocent.com/wp-content/uploads/2016/04/ollins_calvin_court_reported_statement.pdf [https://perma.cc/X58A-MQLK].

[82] *See* Johnson, *supra* note 52, at 720 (finding officers rarely record interrogations); Leo et al., *supra* note 68, at 530 (arguing the absence of a recording makes it difficult for a judge or jury to assess what transpired during an interrogation).

false confession, but reliable enough that his version of the interrogation should be believed over the officer's version.[83]

Second, even when promises of leniency are properly acknowledged, the general population does not fully comprehend their strong psychologically coercive effects.[84] In one study, college students representative of lay people were presented with twenty-two different interrogation scenarios and asked to rate how much pressure the police had put on the suspect.[85] These students rated promises of leniency and immunity as only moderately coercive and on par with depriving a suspect of telephone contact with others, awakening the suspect from sleep, and having a minister urge the suspect to confess.[86] Students also predicted that innocent suspects were more likely to confess under "more coercive" conditions such as threats of harm or punishment and deprivation of basic necessities than when confronted with promises of leniency.[87] Another study not only examined laypeople's ratings of the coerciveness of certain interrogation tactics, but also focused on how likely they thought the tactics were to elicit true or false confessions.[88] The study confirmed that people tend to deem promises of leniency as less coercive than threats of harm, even when the two are objectively equivalent in the amount of behavioral compliance they produce.[89] Furthermore, it demonstrated that people believe promises of leniency are substantially more likely to elicit a true confession than a false confession.[90]

Third, even when people find confessions produced by promises of leniency to be involuntary and consequently inadmissible, they still struggle

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[83] *See* Johnson, *supra* note 52, at 720 (explaining the bind defense attorneys are in when forced to argue their client is trustworthy but gave a false confession).

[84] *See* Kassin, *supra* note 15, at 228–29 (presenting the results of a study that examined peoples' understanding of coercive interrogation techniques).

[85] *Id.* Specifically, students were instructed to rate on a ten-point scale how much pressure the police put on the suspect and to estimate the percentages of truly guilty and truly innocent suspects who would confess. *Id.*

[86] *Id.* In contrast, students rated the threat of harm or punishment as the most coercive and on par with the use of maximization, the actual infliction of physical pain and discomfort, and deprivation of basic needs for food, water, and sleep. *Id.*

[87] *Id.* In the situation rated the least pressure-filled, for example, participants predicted that innocents would falsely confess less than 1% of the time, whereas in in the situation rated the highest pressure-filled, participants predicted that innocents would falsely confess 62% of the time. *Id.*

[88] Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 393–94 (2009).

[89] *Id.* at 394. Participants rated explicit and implicit threats of physical harm as coercive with mean ratings of 4.33 and 4.07 respectively, while explicit and implicit promises of leniency received lower ratings, with mean ratings of 3.67 and 3.37, respectively. *Id.*

[90] *Id.* at 395. Participants rated confronting a suspect with false evidence of guilt as most likely to elicit true confessions, followed by promises of leniency and accusations/re-accusations of guilt. *Id.* They recognized that the direct threat of physical violence was more likely to elicit false confessions. *Id.*

to discount them in reaching a verdict.[91] After reading trial transcripts, mock jurors, participating in a study, fully rejected confessions made under the threat of harm in their verdicts, but utilized confessions made under the promise of leniency.[92] They contended that the confession was inadmissible by law, but nonetheless returned a guilty verdict.[93] Furthermore, research has shown that this bias is not discarded even when jurors are given a bare instruction to discount a confession they find involuntary.[94]

These scientific studies are consistent with more anecdotal evidence collected from the experience of several DNA exonerees.[95] Calvin's aforementioned false confession to robbery, rape, and murder was likely the product of his age, low IQ, and officers' suggestions of leniency.[96] Calvin may have reasonably concluded that the officers' promise to release him in exchange for a confession outweighed the costs of maintaining his innocence.[97] Perhaps more dramatically, a jury convicted Jeffrey Deskovic of rape and murder even though his false confession was the only evidence linking him to the crime and DNA tests before trial revealed swabs from the victim's body contained another man's semen.[98] In his closing argument, the District Attorney stressed that there were "no threats of violence" against Deskovic and stated "Handcuffs placed on him? Guns drawn? Beatings? None of this."[99] The positive reinforcement that lead to Deskovic's false confession was his belief that he was working toward helping the police solve the

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[91] Kassin & Wrightsman, *supra* note 72, at 82–83.

[92] *Id.*; *see* Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instruction, and Mock Juror Verdicts*, J. APPLIED SOC. PSYCHOL. 489, 497 (1981).

[93] Kassin & Wrightsman, *supra* note 72, at 67–94; Kassin & Wrightsman, *supra* note 92, at 497.

[94] Kassin & Wrightsman, *supra* note 72, at 67–94; Kassin & Wrightsman, *supra* note 92, at 497.

[95] *See* GARRETT, *supra* note 35, at 16–17 (reporting on circumstances concerning wrongful convictions).

[96] *See* Gudjonsson, *supra* note 65, at 167 (identifying low intellectual functioning as personal risk factor for falsely confessing); White, *supra* note 4, at 1022–24 (speculating about the circumstances of Calvin's confession); Dellios, *supra* note 2 (explaining Calvin's purported rationale for confessing).

[97] *See* Kassin & McNall, *supra* note 53, at 235 (explaining the commonality of "pragmatic implication," the sending and processing of implicit meanings in communication, as occurs when an individual "reads between the lines" or when information or meaning is inferred from what a speaker is saying or suggesting); Ofshe & Leo, *supra* note 53, at 1001–77, 1117 (explaining that according to rational choice theory, the combination of perceived limited options and consequences, including consequences from promises of leniency, results in suspects' decisions that it is more beneficial to confess than maintain innocence); Dellios, *supra* note 2 (reporting officers promised Calvin that he could go home if he confessed).

[98] GARRETT, *supra* note 35, at 16–17.

[99] *Id.* at 16 (citing Trial Transcript, at 1507–08, State v. Jeffrey Deskovic, No. 192–90 (N.Y. Sup. Ct. Dec. 4, 1990)).

crime and officers' promise to "get the guy responsible."[100] But according to officers, Deskovic gradually realized "that the guy was him."[101] In short, confessions are so inherently prejudicial that people do not fully discount the evidence even when logically and legally appropriate to do so.[102]

B. Constraints on Confession Testimony

The Supreme Court, partially motivated by the heavy weight jurors assign confession testimony, set forth guidelines in 1897 intended to exclude involuntary confessions from being admitted at trial.[103] The currently recognized constitutional protections against involuntary confessions are based upon both the Fourteenth Amendment's Due Process Clause and the Fifth Amendment's privilege against compelled self-incrimination.[104] The underlying aim of these safeguards has continuously shifted over time between ensuring reliability, protecting free will, and honoring fundamental fairness.[105]

1. The Due Process "Voluntariness" Test and Reliability Determinations

The Supreme Court first held the admission of an "involuntary" confession in a criminal trial violates due process in *Brown v. Mississippi* in

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[100] *Id.* at 15.

[101] *Id.*

[102] Kassin & Wrightsman, *supra* note 72, at 83 (finding jurors perceive that confessions induced by promises are more likely to be truthful than those induced by other coercive practices).

[103] *See* Bram v. United States, 168 U.S. 532, 542 (1897) (holding that an involuntary confession was inadmissible).

[104] U.S. CONST. amend. V; *id.* amend. XIV; *see Brown*, 297 U.S. at 286 (holding an inquiry into the admissibility of a confession is controlled in part by the Fourteenth Amendment's Due Process Clause, which requires state action to be "consistent with the fundamental principles of liberty and justice"); *Bram*, 168 U.S. at 542 (holding inquiry into voluntariness of confession is controlled by the Fifth Amendment's command that no person "shall be compelled in any criminal case to be a witness against himself").

[105] *See* Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 742–43 (1963) (arguing the Court originally viewed the term "voluntary" as interchangeable with "trustworthy" and "reliable"); Leo et al., *supra* note 68, at 494 (arguing the Supreme Court's shifting underlying rationale for its due process voluntariness decisions loosely corresponds to the goals of criminal justice system of promoting truth-finding, protecting individual rights, and checking state power). Although at times the underlying rationale appeared to be excluding untrustworthy evidence, the Court also sought to prevent unfairness and deter oppressive and unfair police interrogation methods. *See* Lisenba v. California, 314 U.S. 219, 236, 240 (1941) (holding due process requirement as applied to confessions was not intended to prevent the admissibility of false confessions at trial, but instead prevent unfairness to the defendant, regardless of whether the confession was true or false); *see also Malinski*, 324 U.S. at 405–07 (finding that a defendant's confession after seven hours of periodic and soft questioning was involuntary because he was stripped and kept naked for three hours before being provided a blanket); Ashcraft v. Tennessee, 322 U.S. 143, 154–55 (1944) (finding a defendant's confession involuntary because he was interrogated in isolation continuously for thirty-six hours).

1936, but it was not always clear which rationale the Court was relying upon in *Brown*'s progeny.[106] The Court's holdings have evolved to require a balancing test that examines pressures and police techniques during interrogation, as they interacted with the suspect's personal vulnerabilities, to determine whether they were sufficient to render a confession involuntary by overbearing on the suspect's capacity for autonomous choice.[107] Now, if a suspect's confession is coerced and not the product of his or her free will, it will be inadmissible at trial.[108]

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[106] *See* Schulhofer, *supra* note 75, at 867–69 (1981) (analyzing the development of the Supreme Court's due process "voluntariness" test). In the 1936 case of *Brown v. Mississippi*, the Court reversed the convictions of three black tenant farmers who had confessed to murder after they were tortured. 297 U.S. at 281, 287. The farmers specifically confessed to murdering a white man after being whipped and pummeled. *Id.* The Court appeared concerned that involuntary confessions are inherently less trustworthy, and that their unreliability violates defendants' rights to fundamental fairness. *See id.* at 283 (focusing on the effect of physical discomfort on the defendants' state of mind in holding their confessions involuntary); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 112 (1997) (arguing that the Supreme Court's initial voluntariness test was seen as a trustworthiness test). In 1940, Wigmore stated that the sole principle involved in the test for admissibility of confessions was trustworthiness. 2 WIGMORE, EVIDENCE §§ 822, 823 (3d ed. 1940). Years later in 1970, Wigmore again endorsed this view and argued that confessions should not be excluded because of any illegality in the methods used in obtaining them or because of any connection with the privilege against self-incrimination alone. 3 WIGMORE, EVIDENCE § 823, at 337–38 n.2 (Chadbourne rev. 1970). In the 1941 case of *Lisenba v. California*, however, the Supreme Court made clear that reliability is not the central due process concern raised by involuntary confessions. *See* 314 U.S. at 236 (holding due process requirement was not intended to prevent the admissibility of false confessions at trial, but rather prevent unfairness to the defendant, regardless of whether the confession was true or false). The Court instead appeared to reason that it was an interrogator's use of overly oppressive methods that violates a defendant's due process rights. *Id.* at 236. With this focus in mind, the Court declared that holding the defendant in custody without counsel for two days prior to his arraignment for the murder of his wife did not render the admission of his confession a violation of due process and affirmed the decision to deny the defendant a writ of habeas corpus. *Id.* at 240. The Court relied on this rationale in several cases following *Lisenba*. *See Malinski*, 324 U.S. at 405–07 (finding a defendant's confession after seven hours of periodic and soft questioning was involuntary because he was stripped and kept naked for three hours before being provided a blanket); *Ashcraft*, 322 U.S. at 154–55 (finding a defendant's confession involuntary because he was interrogated in isolation continuously for thirty-six hours).

[107] Leo et al., *supra* note 68, at 496 (arguing the voluntariness test has evolved to focus on whether suspects' free will was overcome by coercive interrogation methods); Schulhofer, *supra* note 75, at 867 (arguing that the voluntariness test was concerned with whether the totality of the circumstances indicated suspects' will had been overcome).

[108] Townsend v. Sain, 372 U.S. 293, 307 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Leo et al., *supra* note 68, at 496. State action, typically in the form of police coercion, is a necessary predicate for any finding that the admission of a statement violates due process. Colorado v. Connelly, 479 U.S. 157, 163–65 (1986). Confessions which are the product of violence are per se involuntary, but confessions which are the product of psychological coercion remain subject to this totality of the circumstances balancing test. *Id.* at 164; 29 AM. JUR. 2D *Evidence* § 739, Westlaw (database updated Apr. 2019).

Trial judges hold pre-trial hearings to determine whether a confession was voluntary and if its admission would be constitutional.[109] The lack of a bright line rule compels courts to determine the voluntariness of a confession on a case-by-case basis.[110] As a result, the application of this balancing test has been widely criticized for leaving police without sufficient and much needed guidance, impairing judicial review, and allowing considerable interrogation pressure, among other concerns.[111]

If the judge finds a confession voluntary, he or she may admit the confession either with or without a special instruction to the jury requiring them to make an independent determination of voluntariness and to disregard statements they find were involuntary products of coercion.[112] In contrast to

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[109] GARRETT, *supra* note 35, at 37. If the only possible finding at this pre-trial motion to suppress is that the confession was involuntary in violation of the Fourteen Amendment the judge must exclude the confession. Note, *The Role of Judge and Jury in Determining a Confession's Voluntariness*, 48 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 59, 60–61 (1957) [hereinafter *The Role of Judge and Jury*].

[110] *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 351, 353 (1998) (observing the court's role in protecting due process is identifying presence of circumstances in which defendants' will is in fact overborne on a case-by-case basis and noting there is no "litmus test" or "bright line" for determining this question). *But see* Schulhofer, *supra* note 75, at 874 (critiquing case-by-case basis approach).

[111] Schulhofer, *supra* note 75, at 869–74. The ambiguity of the totality of the circumstances approach makes it unpredictable in practice, and consequently police cannot foresee how a court will evaluate a confession. *Id.* at 869. Appellate courts are unlikely to overrule trial court judgments on the issue of voluntariness because the fact intensive nature of the inquiry seems to demand deference at the appellate level. *Id.* Ultimately, the vagueness of the totality of the circumstances test excluded few confessions, even when they seemed to be products of coercion, because judges gave weight to their own subjective preferences. *See* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 470 (2005) (finding the "wiggle room" and subjective nature of the voluntariness test allowed judges substantial freedom in interpreting facts of an interrogation to find confessions admissible).

[112] Aaron J. Good, *You Made Me Promises, Promises: Determining the Existence of Promises of Leniency During Custodial Interrogation and the Proper Standard of Review* [State v. Sharp*, 210 P.3d 590 (Kan. 2009)*], 49 WASHBURN L.J. 905, 915 (2010) (finding that Kansas treats the existence of a promise as a question of fact for the jury to decide); Kassin & Gudjonsson, *supra* note 32, at 36, 56 (noting that juries are expected, implicitly or explicitly, to determine whether a confession was voluntary based on the totality of the circumstances). Under the California "orthodox" rule, the judge admits confessions which he or she finds voluntary and the function of the jury is to determine the weight and credibility of the confession. Kassin & Wrightsman, *supra* note 72, at 81. In contrast, under New York procedure and the Massachusetts "humane" rule, the judge admits which confessions he or she finds voluntary with an instruction to the jury that they must make an independent determination of voluntariness before considering its credibility and relying on it in reaching a verdict, which increases the jury's role in the voluntariness test. *Id.*; *The Role of Judge and Jury*, *supra* note 109, at 60. The following is an excerpt from the current voluntariness instruction given in Massachusetts:

> You have heard testimony about a statement allegedly made by the defendant concerning the offense which is charged in this case. Before you may consider any such statement, you are going to have to make a preliminary determination whether it can

voluntariness instructions, judges may also rely on credibility instructions that focus on the reliability of the defendant's incriminating statements.[113]

> be considered as evidence or not. You may not consider any such statement in your deliberations unless, from all the evidence in the case, the Commonwealth has proven beyond a reasonable doubt that the defendant made the statement that he (she) is alleged to have made, and that he (she) made it voluntarily, freely and rationally.

MASSACHUSETTS JURY INSTRUCTION 3.560: CONFESSIONS AND ADMISSIONS (HUMANE PRACTICE) (2018), https://www.mass.gov/doc/3560-confessions-and-admissions-humane-practice/download [https://perma.cc/97QR-V8UA]. Massachusetts also provides the following expanded charge on voluntariness:

> In determining whether or not any statement made by the defendant was voluntary, you may consider all of the surrounding circumstances. You may take into account the nature and duration of any conversations that the police officers had with the defendant. You may consider where and when the statement was made. You may consider any evidence you have heard about the defendant's physical and mental condition, his (her) intelligence, age, education, and experience . . . . Your decision does not turn on any one factor; you must consider the totality of the circumstances.

Id. Some courts also permit expert testimony on false confessions. *See* Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 39 (2008) (arguing for expert testimony on false confessions to enhance jurors' ability to evaluate confession evidence); Christopher Slobogin, *The Structure of Expertise in Criminal Cases*, 34 SETON HALL L. REV. 105, 113, 114 (2003) (examining admissibility of expert testimony on false confessions).

[113] Dayna M. Gomes et al., *Examining the Judicial Decision to Substitute Credibility Instructions for Expert Testimony on Confessions*, 21 LEGAL & CRIMINOLOGICAL PSYCHOL. 319, 321 (2016). For example, the Supreme Judicial Court of Massachusetts cautions the jury to weigh confessions with great care when they resulted from an unrecorded interrogation. Commonwealth v. DiGiambattista, 813 N.E.2d 516, 518 (Mass. 2004); Kassin & Gudjonsson, *supra* note 32, at 60. In *DiGiambattista*, there was a factual dispute over whether an implicit promise was made to the defendant during an unrecorded interrogation that "counseling" would follow his confession. 813 N.E.2d at 525. The Supreme Judicial Court held that when police do not record an interrogation, the defendant may request a jury instruction "advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable," that the jury "should weigh evidence of the defendant's alleged statement with great caution and care," and that the "absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." *Id.* at 533–34. Several scholars have advocated for educational credibility instructions on confession evidence. *See generally* Angela M. Jones & Steven Penrod, *Research-Based Instructions Induce Sensitivity to Confession Evidence*, 25 PSYCHIATRY PSYCHOL. & L. 257 (2017) (arguing for science-based instructions on coercive interrogation techniques). Credibility instructions have been advocated for and given in similar contexts, such as in cases with eyewitness identification testimony. *See* Marlee Kind Dillon et al., Henderson *Instructions: Do They Enhance Evidence Evaluation?*, 17 J. FORENSIC PSYCHOL. PRAC., 1, 17, 18 (2017) (finding *Henderson* juror instructions on eyewitness identification based on scientific research enhance jurors' skepticism of eyewitness testimony); Nell B. Pawlenko et al., *A Teaching Aid for Improving Jurors' Assessment of Eyewitness Accuracy*, 27 APPLIED COGNITIVE PSYCHOL. 190, 195 (2013) (finding that educating jurors about eyewitness identification based on scientific research increases the likelihood of a guilty verdict); Christian Sheehan, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 674 (2011) (arguing for jury instructions on eyewitness identifications).

Although reliability can be considered in weighing a confession, the Supreme Court has ruled out reliability as a reason to *exclude* a confession.[114]

2. The Privilege Against Self Incrimination and *Miranda*

In 1966, the Supreme Court held in *Miranda v. Arizona* that the admission of a confession given within a custodial interrogation violates the Fifth Amendment privilege against self-incrimination in the absence of a knowing waiver of certain constitutional rights.[115] The *Miranda* warning itself, as well as the exclusion of confessions given in its absence, are procedures intended to protect both the suspect's ability to make autonomous decisions and the reliability of his or her confession.[116] These *Miranda* guidelines have been scrutinized for failing to meet such policy goals.[117] Foremost, a majority of suspects waive their *Miranda* rights and many of the characteristics that make a suspect vulnerable to waiving their rights are the same as those that make a suspect vulnerable to giving a false confession.[118] Secondly, once the interro-

[114] *Connelly*, 479 U.S. at 167 (holding that an unreliable confession was nevertheless admissible because unreliability is an issue of evidentiary law, not due process); *Lisenba*, 314 U.S. at 236 (holding that due process is intended to prevent unfair use of evidence, regardless of that evidence's truth or falsity); GARRETT, *supra* note 35, at 40. In *Connelly*, a mentally ill man suffering from psychotic delusions that God wanted him to confess to murder or commit suicide, walked up to a police officer and confessed to a murder. 479 U.S. at 160–61. After the state was unable to corroborate that there had been any recent unsolved murder and after the state-employed psychiatrist offered uncontested testimony about the defendant's delusions, the Court found that the confession was unreliable. *Id.* Nonetheless, the Court also found there were no applicable constitutional constraints on its admissibility. *Id.* at 167.

[115] *Miranda*, 384 U.S. at 444 (holding that prior to any custodial interrogation, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed). The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. *Id.* The application of *Miranda*'s protections is limited to custodial interrogations, which *Black's Law Dictionary* defines as "[p]olice questioning of a detained person about the crime that he or she is suspected of having committed." *Id.* at 444; *Interrogation*, BLACK'S LAW DICTIONARY (10th ed. 2014). In contrast, a noncustodial interrogation involves police questioning a suspect who has not been detained and can leave at will. *Interrogation*, *supra*.

[116] *See* Withrow v. Williams, 507 U.S. 680, 692 (1993) (quoting Johnson v. New Jersey, 384 U.S. 719, 730 (1966)) (holding that *Miranda* serves to guard against "the use of unreliable statements at trial").

[117] *See* Garrett, *supra* note 14, at 1058 (arguing *Miranda* failed to procure the reliability of convicts' confessions where DNA testing later proved their confessions false); Ofshe & Leo, *supra* note 53, at 1116 (critiquing *Miranda* for not protecting against admission of unreliable statements); Penney, *supra* note 110, at 366–67 (arguing *Miranda* does not properly protect autonomous choice).

[118] Ofshe & Leo, *supra* note 53, at 1116 (finding 78.29% of suspects waive their *Miranda* rights based on nine months of fieldwork and observation of 122 interrogations in the Criminal Investigation Division of a major urban police department and observations of sixty videotaped interrogations in two other police departments); *see* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Assessment of the Effects of* Miranda, 43 UCLA L. REV.

gator recites the *Miranda* warnings and obtains a waiver, *Miranda* no longer offers any protection against the possibility of a false confession.[119]

3. The Admissibility of Promise-Induced Confessions at Trial

Although promises of leniency are a relevant consideration, courts generally hold they are not coercive enough, in the absence of other factors, to render a confession involuntary.[120] Particularly, courts have held that a

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839, 851–52, 859 (1996) (finding 83.7% of suspects waive their *Miranda* rights based on six weeks of field work attending screening sessions of 219 interrogations in the Salt Lake County District Attorney's office); Kassin & Gudjonsson, *supra* note 32, at 39 (finding that the same characteristics heighten the chance of a false confession and a waiver of rights). For example, people who typically defer to authority figures, such as youth and mentally handicapped suspects, are more likely to waive their *Miranda* rights. *See* Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 45 n.58, 57 (2006) (finding that youth are more likely to wave *Miranda* rights); Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 L. & HUM. BEHAV. 533, 534 (1995) (finding that mentally retarded adults waive their *Miranda* rights at a higher rate because they desire to please others and are more susceptible to coercion); Kassin, *supra* note 56, at 251 (finding more than 90% of interrogated youth waive their *Miranda* rights); Kassin et al., *supra* note 13, at 8 (finding juveniles and adults with mental disabilities more likely to waive *Miranda* rights and less likely to understand those rights and the consequences of waiving them). Innocence also puts suspects at risk for waiving their *Miranda* rights. *See* Kassin, *supra* note 56, at 251 (finding 81% of innocent suspects signed a waiver because they felt they "had nothing to hide," whereas only 36% of guilty suspects signed a *Miranda* waiver); Kassin & Norwick, *supra* note 67, at 211–21 (finding, in a study of seventy-two participants who were guilty or innocent of a mock theft, participants who were truly innocent were significantly more likely to sign a waiver than those who were guilty); Ofshe & Leo, *supra* note 53, at 1117 (finding innocent suspects more likely to waive *Miranda* rights because they are likely to believe that ending the interrogation will lead to arrest, whereas continuing interrogation may lead to officer recognizing their innocence).

[119] *See* Garrett, *supra* note 14, at 1058 (noting all forty convicts exonerated by DNA who falsely confessed waived their *Miranda* rights and thus enjoyed no Miranda protections); Leo et al., *supra* note 68, at 498 (observing that, once waived, *Miranda* rights offer no protection against subsequent coercive interrogation techniques).

[120] *Custodial Interrogations*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 181, 206 (2011); *see* United States v. Okafor, 285 F.3d 842, 847 (9th Cir. 2002) (holding that promises of leniency do not render a suspect's statement involuntary unless, under the totality of the circumstances, they clearly overbore the suspect's free will); United States v. Bye, 919 F.2d 6, 9 (2d Cir. 1990) (holding that promises of leniency do not render a suspect's statement involuntary in the absence of other circumstances); *see, e.g.*, United States v. Binford, 818 F.3d 261, 266, 272 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 621 (2017) (holding officer's promise of "you help me, I help you" to suspect accused of possession of drugs and firearm did not render suspect's statements involuntary per se); United States v. Turner, 674 F.3d 420, 433 (5th Cir. 2012) (holding officer's promise that if suspect accused of robbery could "get it straight," he could see his four-year-old daughter's first day of school did not render suspect's statements involuntary per se); United States v. Charles, 476 F.3d 492, 498 (7th Cir. 2007) (holding officer's promise to suspect accused of selling cocaine that the District Attorney would give him favorable treatment did not render suspect's statements involuntary per se); United States v. Kilgore, 58 F.3d 350, 353 (8th Cir. 1995) (holding officer's promises to suspect accused of mail embezzlement that suspect would not go to jail that evening and could retrieve his car from impound lot, did not render confession involuntary per se).

defendant's incriminating statement is not rendered involuntary by promises to make a suspect's cooperation known to prosecutors or judges.[121] Courts are similarly hesitant to declare that promises related to a suspect's sentence or probation situation render his confession involuntary.[122] In addition, Courts usually hold that even outright promises not to prosecute the suspect or make an arrest do not per se overbear his or her free will or capacity for self-determination.[123] In rare circumstances, promises of leniency are con-

[121] *See, e.g.*, United States v. Swan, 842 F.3d 28, 31, 34 (1st Cir. 2016) (holding officer's promise to suspect accused of economic crimes that he would bring suspect's cooperation to the prosecutor's attention did not render suspect's statements involuntary); United States v. Stokes, 631 F.3d 802, 808 (6th Cir. 2011) (holding officer's promise to suspect accused of bank robbery that he would notify the prosecutor of suspect's cooperation did not render suspect's statements involuntary); United States v. Gaines, 295 F.3d 293, 297, 299 (2d Cir. 2002) (holding agent's promise to suspect accused of unlawful possession of a firearm that he would make suspect's cooperation known to prosecutor and judge did not render suspect's statements involuntary); Alston v. Redman, 34 F.3d 1237, 1254 (3d Cir. 1994) (holding investigators' promise to suspect accused of robbery, that he would recommend to prosecution that suspect's cooperation allow him to plead to one count of first degree robbery, did not render suspect's confession involuntary).

[122] *See, e.g.*, United States v. Villalpando, 588 F.3d 1124, 1129 (7th Cir. 2009) (holding officer's promise to suspect accused of selling cocaine that she would try to persuade probation officer not to revoke probation did not render suspect's confession involuntary); United States v. Purkey, 428 F.3d 738, 746 (8th Cir. 2005) (holding officer's promise to suspect accused of murder, kidnapping and rape that authorities would not pursue the death penalty did not render suspect's confessions involuntary); *Okafor*, 285 F.3d at 847 (holding agent's promise to suspect accused of drug offense that cooperation could help him avoid lengthy prison sentence did not render suspect's confession involuntary); United States v. Nash, 910 F.2d 749, 752–53 (11th Cir. 1990) (holding officer's implied promise to suspect accused of conspiring and attempting to import cocaine that cooperating defendants generally "fared better time-wise," did not render suspect's confession involuntary); United States v. Davidson, 768 F.2d 1266, 1271 (11th Cir. 1985) (holding DEA agent's promise to suspect accused of selling marijuana that suspect could receive shorter sentence if he cooperated did not render suspect's confession involuntary).

[123] *See* United States v. Thunderhawk, 799 F.3d 1203, 1206 (8th Cir. 2015) (holding FBI agent's promise that defendant would not be arrested at interview's closing did not render defendant's incriminating statements involving sexual abuse of minor involuntary); United States v. Estey, 595 F.3d 836, 839 (8th Cir. 2010) (holding officer's assurance that suspect accused of crimes relating to child pornography would not be arrested at interview's closing, which suspect misunderstood to be offer of total immunity, did not render suspect's confession involuntary); United States v. Craft, 495 F.3d 259, 263–64 (6th Cir. 2007) (holding officer's promise that he was "not interested in the drugs" but only in the homicide did not render suspect's confession involuntary); United States v. Jacobs, 431 F.3d 99, 112–13 (3d Cir. 2005) (holding FBI agent's promise to suspect accused of narcotics trafficking conspiracy that he would not use suspect's statements to prosecute her did not render suspect's confession involuntary); United States v. Santiago, 410 F.3d 193, 202–03 (5th Cir. 2005) (holding officer's assurance that suspect accused of unlawful possession of a firearm would not be arrested if he cooperated did not render suspect's confession involuntary); United States v. Flemmi, 225 F.3d 78, 91–92 (1st Cir. 2000) (holding FBI agents' promise of immunity for surveillance to suspect accused of conspiracy to commit extortion and racketeering did not render suspect's statements regarding surveillance involuntary); United States v. Otters, 197 F.3d 316, 318 (8th Cir. 1999) (holding officer's promise to suspect accused of selling methamphetamine that he would not file state charges associated with traffic stop if defendant cooperated did not render suspect's statements involuntary); United States v. Byram, 145 F.3d 405, 406–08 (1st Cir. 1998) (officer's assurance to suspect accused of possession

sidered sufficiently coercive to render a confession involuntary when combined with additional factors such as age, low IQ, officers' exaggeration of incriminating evidence or other coercive techniques.[124] Yet in many instances, the court has entirely failed to recognize that a statement constituted a promise of leniency where the promise was implied rather than explicit, and in some cases, that a statement was even made at all.[125] But confession

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of a firearm as a felon that suspect was not in danger of prosecution for making statements at trial of another person did not render the incriminating statements he made at that trial involuntary); United States v. Larry, 126 F.3d 1077, 1079 (8th Cir. 1997) (holding officer's promise to suspect accused of possessing ammunition that suspect would be released from jail and avoid prosecution for drive-by-shooting did not render suspect's confession regarding shotgun involuntary); Sprosty v. Buchler, 79 F.3d 635, 646–47 (7th Cir. 1996) (holding officer's promise to suspect accused of sexual crimes that burglary charges in another state would be dropped did not render suspect's confession to sexual assault and exploitation of child involuntary); United States v. Matthews, 942 F.2d 779, 782 (10th Cir. 1991) (holding officer's promises to release suspect if he identified certain drug operators at airport and that there would be no state charges and probably no federal charges if suspect cooperated were insufficient to render suspect's statements involuntary). *But see* United States v. Lall, 607 F.3d 1277, 1287 (11th Cir. 2010) (holding officer's assurance to suspect accused of armed robbery that anything defendant said would not be used to prosecute him rendered defendant's confession in his bedroom to credit card fraud involuntary).

[124] *See* United States v. Preston, 751 F.3d 1008, 1010, 1014, 1028 (9th Cir. 2014) (holding officers' promise to suspect accused of aggravated sexual abuse of minor that he would not "tell this [confession] to anybody" contributed to involuntariness of confession where suspect was 18, had IQ of 65, and officers had exaggerated evidence against suspect); United States v. Lopez, 437 F.3d 1059, 1061, 1064–66 (10th Cir. 2006) (holding agent's implied promise that suspect accused of murder would spend fifty-four fewer years in prison if he confessed to killing victim by mistake contributed to involuntariness of confession where agent reinforced such promise by telling suspect about other suspects' experiences with confessing, misrepresented and exaggerated evidence against suspect, and suspect suffered an unrelated beating two days prior); United States v. Rogers, 906 F.2d 189, 190 (5th Cir. 1990) (holding officer's assurance that suspect accused of purchasing stolen guns would not be prosecuted contributed to involuntariness of confession where officer failed to reveal suspect was target of investigation and used other coercive techniques); United States v. Tingle, 658 F.2d 1332, 1336–37 (9th Cir. 1981) (holding officer's promise to suspect accused of purloining funds that he would bring cooperation to prosecutor's attention contributed to involuntariness of confession where officer also warned the suspect she had "a lot at stake," would not see her two year old child "for a while," and that he would tell the prosecutor she was "stubborn or hard headed" if she did not cooperate). *But see* United States v. Jacques, 744 F.3d 804, 807, 808–09 (1st Cir. 2014) (declaring suspect accused of burning a church made statements voluntary despite officers' promising confession would lead to "softer treatment" by prosecutor and judge, warning that failure to cooperate would likely result in maximum sentence, exaggerating of strength of evidence against suspect, misrepresenting involvement of high-profile federal agents in case, minimizing magnitude of suspect's criminal conduct, interrupting suspect's attempts to deny guilt, and suggesting that continued resistance would subject suspect to more damning media coverage and deprive him of crucial years with his family); United States v. Jackson, 608 F.3d 100, 103 (1st Cir. 2010) (holding officers' suggestion to suspect accused of trading stolen gun for drugs that cooperation could result in leniency was voluntary despite many officers present at apartment and suspect's resulting nervous demeanor).

[125] *See, e.g.*, United States v. Li Xin Wu, 668 F.3d 882, 886 (7th Cir. 2011) (declaring that a suspect of drug related offenses was not promised immunity, despite his claim to the contrary on appeal, because the suspect did not present any evidence or move to exclude the statements at trial); United States v. Montgomery, 555 F.3d 623, 629–30 (7th Cir. 2009) (holding that an officer

cases with similar fact patterns nonetheless result in different holdings and Federal Courts are ultimately in disarray when it comes to identifying promises of leniency and ruling on the admissibility of any confessions that follow.[126]

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did not promise a suspect accused of possession of a firearm as a felon that he would not receive a ten year sentence if he confessed because officer's statements were intended to address suspect's concerns that he would be tried on federal rather than state charges); United States v. Mashburn, 406 F.3d 303, 310 (4th Cir. 2005) (declaring that an officer did not make promise to a suspect accused of possession of a firearm and methamphetamine facing a ten year sentence when he claimed that the suspect could only reduce it by cooperating, but instead merely "informed suspect of the gravity of his suspected offenses and the benefits of cooperation under the federal system"); Thai v. Mapes, 412 F.3d 970, 979 (8th Cir. 2005) (holding an officer's assurance to a suspect accused of murder and terrorism that members of the group involved in the murder would not hurt suspect if he made a statement because the officer would protect him did not constitute promise of leniency); United States v. Stewart, 388 F.3d 1079, 1086 (7th Cir. 2004) (holding an officer's remark to a suspect accused of a bank robbery, in answer to arrestee's question of whether he would be charged if he informed officers as to who had committed robbery, that the arrestee would be "all right" as long as he had no direct involvement, could not be construed as promise of leniency); Simmons v. Bowersox, 235 F.3d 1124, 1132–34 (8th Cir. 2001) (holding that an officer's promise to a suspect accused of murder that he would receive either the death penalty or life in prison and that it would be in defendant's "best interest" to tell the truth did not render the suspect's confession involuntary because the statement did not constitute an implied or express promise in this context); United States v. Braxton, 112 F.3d 777, 783 (4th Cir. 1997) (holding that an officer's admonishment to a suspect accused of making false statements during the purchase of firearms that the suspect should tell the truth or face consequences was not an implied promise); United States v. Ramirez, 112 F.3d 849, 853 (7th Cir. 1997) (holding that an agent's comment that the United States Attorney could ask for downward sentence departure if the suspect accused of conspiracy to distribute methamphetamine cooperated was not a promise, but instead was "merely pointing out, what is anyway obvious"); United States v. Broussard, 80 F.3d 1025, 1033–34 (5th Cir. 1996) (holding that officer's promise to a suspect accused of crimes relating to involvement in a drug ring that he would make the suspect's cooperation known to the U.S. Attorney did not constitute promise of leniency because it was clear he would go to prison); Bannister v. Armontrout, 4 F.3d 1434, 1440 (8th Cir. 1993) (holding a comment made to capital murder suspect that it would be in his "best interest to cooperate" did not constitute promise of leniency in death penalty case); Bolder v. Armontrout, 921 F.2d 1359, 1366 (8th Cir. 1990) (holding that a statement to a capital murder suspect that telling the truth about a stabbing incident "would be better for him" was not an express or implied promise of leniency).

[126] *Compare Preston*, 751 F.3d at 1010, 1014, 1028 (holding that officers' promise to a suspect accused of aggravated sexual abuse of a minor that he would not "tell this [confession] to anybody" contributed to the involuntariness of a confession where the suspect was 18, had IQ of 65, and when the officers exaggerated evidence against suspect), *and Lopez*, 437 F.3d at 1061, 1064–66 (holding that an agent's implied promise that a suspect accused of murder would spend 54 fewer years in prison if he confessed to killing a victim by mistake contributed to involuntariness of confession where the agent reinforced such promise by telling the suspect about other suspects' experiences with confessing, misrepresented and exaggerated evidence against suspect, and where the suspect had suffered an unrelated beating 2 days prior), *with Jacques* 744 F.3d at 807, 808–09 (declaring that a suspect accused of burning a church made statements voluntary). In *Jacques*, the court found the arson suspect's statements voluntary despite officers' promising that the confession would lead to "softer treatment" by the prosecutor and judge, warning that failure to cooperate would likely result in maximum sentence, exaggerating the strength of evidence against suspect, misrepresenting involvement of high-profile federal agents in case, minimizing magnitude of suspect's criminal conduct, interrupting suspect's attempts to deny guilt, and sug-

II. LESSONS FROM PROMISES OF LENIENCY IN ANOTHER CONTEXT

Promises of leniency are not only used to induce suspects to confess, but they are also used to encourage defendants to plead guilty.[127] Plea bargaining is the process by which prosecutors induce defendants to confess to guilt in court, in exchange for a more favorable outcome than they would likely receive following a post-trial finding of guilt.[128] Plea bargaining is commonplace in the American criminal justice system and now over ninety percent of federal criminal cases result in a guilty plea.[129] The legitimacy of this long standing practice was first recognized in the 1975 amendments to Rule 11 of the Federal Rules of Criminal Procedure and is now governed by this rule as well as several Supreme Court decisions.[130] Section A of this Part overviews the procedures used to obtain a guilty plea, and explains how many of the same risk factors that heighten the chance of a false confession also heighten the chance of a false guilty plea.[131] Part B points out that a willingness to only fully acknowledge the coercive nature of promises in the latter has led to inconsistent safeguards.[132]

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gesting that continued resistance would subject suspect to more damning media coverage and deprive him of crucial years with his family. *Id.*

[127] Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 71–72 (2005) (noting that all guilty pleas necessarily entail a defendant's choice to confess in exchange for a promise).

[128] *See* CHARLES ALAN WRIGHT ET AL., 1A FED. PRAC. & PROC. *Criminal Procedure* § 180, Westlaw (4th ed., database updated 2018) (explaining the plea bargaining process); McCoy, *supra* note 127, at 71–72 (noting that a guilty plea always results in a defendant foregoing trial). Essentially, plea bargaining facilitates the conservation of judicial resources because the prosecutor is relieved of the need to prove the defendant's guilt at trial and the Court can spare the resources that would have been required for such an adjudication. WRIGHT ET AL., *supra*, § 180 (explaining government and defendants' rationale behind guilty pleas).

[129] WRIGHT ET AL., *supra* note 128, § 180; *see* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (discussing that the criminal justice system is dominated by pleas rather than trials); Missouri v. Frye, 566 U.S. 134, 143 (2012) (stating plea bargaining is essential to the criminal justice system); Bousley v. United States, 523 U.S. 614, 634 (1998) (Scalia, J., dissenting) (pointing out that 93% of federal criminal cases result in a guilty plea); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (arguing that plea bargaining is not just an appendage to the criminal justice system, but could instead be characterized as the criminal justice system itself). *See generally* DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY (1992) (providing a history of defendants' rights at trial in state and federal courts).

[130] WRIGHT ET AL., *supra* note 128, § 180; *see* Bryan v. United States, 492 F.2d 775, 780 (5th Cir. 1974) (discussing the history of plea bargaining in the U.S. criminal justice system).

[131] *See infra* notes 133–149 and accompanying text.

[132] *See infra* notes 150–172 and accompanying text.

A. Promise-Induced False Guilty Pleas

1. Plea Agreement Procedures

When a defendant accepts an offer to plead guilty, he or she usually waives important rights such as the right to a jury trial, the right to confront one's accusers, the right to appeal, and the privilege against self-incrimination.[133] In exchange, the prosecutor promises the defendant leniency in the form of a charge reduction or a recommendation for a reduced sentence and therefore promises of leniency can be considered part of any guilty plea.[134] The parties must fully disclose the terms of the deal in open court for the court's consideration.[135] Once a court accepts a plea agreement, it is binding and a legal remedy is available to the defendant if the prosecutor fails to comply with its terms.[136]

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[133] Brady v. United States, 397 U.S. 742, 748 (1970) (holding guilty pleas and accompanying waivers of constitutional rights must be "voluntary" and "knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences"); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (holding admissibility of a confession depends on whether its voluntariness satisfies the constitutional rights of the defendant). Each of these rights is now applicable to the states by reason of the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 147, 150 (1968) (finding that the right to trial by jury applies to the states); Pointer v. Texas, 380 U.S. 400, 404 (1965) (finding the right to confrontation applies to the states); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (finding that the privilege against self-incrimination applies to the states). Although there is no constitutional right to appeal, that right is now recognized for all significant criminal convictions by state or court rule. *See* Jones v. Barnes, 463 U.S. 745, 756–57 n.1 (1983) (Brennan, J., dissenting) (noting the right to appeal is "universal" by reason of state or court rule).

[134] FED. R. CRIM. P. 11(b)(2). There are currently three types of concessions recognized by the Federal Rules of Criminal Procedure that a prosecutor may offer in return for a guilty plea to either the current charge or a lesser or related charge. *Id.* R. 11(c)(1). A prosecutor can: (A) not bring additional charges, or move to dismiss additional charges already filed; (B) recommend, or agree not to oppose, the defendant's request that a particular sentence or sentencing range is appropriate, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply; (C) agree that a particular sentence or sentencing range is appropriate, or that a particular Sentencing Guideline provision, policy statement, or sentencing factor does or does not apply. *Id.*

[135] *Id.* R. 11(c)(1). Only the prosecutor and defense counsel or the defendant personally may participate in the plea discussions. *Id.* This explicit prohibition is intended to prevent even the appearance that the judge is pressuring a defendant to plead guilty. *See* United States v. Davila, 569 U.S. 597, 606 (2013) (holding the prohibition was included to rid the defendant of any concern that refusing to plead guilty might upset the judge presiding over his subsequent trial); United States v. Braxton, 784 F.3d 240, 243 (4th Cir. 2015) (finding the three principal interests in curbing judicial participation in plea discussions are diminishing the possibility of judicial coercion, protecting against partiality in the judicial process, and eliminating the misleading impression that the judge is an advocate for the agreement); Scott v. United States, 419 F.2d 264, 274 (D.C. Cir. 1969) (finding any participation by the judge in plea bargaining discussions places "direct and immediate pressure" on a defendant to plead guilty).

[136] *See* FED. R. CRIM. P. 11(c)(4) (requiring the court's acceptance of the plea agreement); Santobello v. New York, 404 U.S. 257, 262–63 (1971) (remanding case to determine whether the petitioner was entitled to specific performance of the plea agreement or opportunity to withdraw his plea where government broke plea agreement after court accepted it); United States v. Wash-

2. Similar Situational and Personal Risk Factors

Despite the prevalence and recognized legitimacy of plea bargains, many of the same interdependent situational and personal risk factors that heighten the probability of a wrongful conviction in the confession setting are also present in the plea negotiation setting.[137] One situational risk factor present in both interrogators' and prosecutors' questioning is their reliance on psychological coercion and social influence techniques.[138] For example, like those who confess, defendants who agree to a plea may be misled about the strength of the evidence against them, which in turn produces the false acceptance of responsibility.[139] Admittance of guilt may also be motivated by a rational choice to escape one's current situation, whether it be the questioning during an interrogation or imminent jail time during a plea discussion.[140] And of course, every guilty plea necessarily involves an inherently

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man, 66 F.3d 210, 213 (9th Cir. 1995) (holding whether guilty plea was binding was contingent on the court's review of presentence report and subsequent acceptance). In 1971, in *Santobello v. New York*, the Court held that when a defendant relies on a prosecutor's promise in pleading guilty, the prosecutor's breach of that promise makes the defendant's plea constitutionally invalid. 404 U.S. at 262–63. Subsequent cases indicate the defendant has legal remedies in this situation. *See, e.g.*, United States v. Thomas, 580 F.2d 1036, 1038 (10th Cir. 1978) (holding broken promise by government in plea bargaining situation which results in entry of a plea of guilty in criminal proceeding may justify either setting aside plea of guilty or remand for purpose of compelling specific performance of government's promise); United States v. Scharf, 551 F.2d 1124, 1126 n.4 (8th Cir. 1977) (finding breach of a plea bargain itself by government may entitle defendant who has pleaded guilty in reliance on the bargain to withdrawing plea).

[137] *See* FED. R. CRIM. P. 11 (codifying plea-bargaining system); *Confession*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a confession as an admission of guilt of a crime); *Plea*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a guilty plea as in-court admission of having committed charged offense); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467, 2469 (2004) (explaining situational risk factors in guilty plea context); Drizin & Leo, *supra* note 13, at 912–14 (explaining situational risk factors in confession context); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 L. & HUM. BEHAV. 79, 82 (2010) (explaining personal risk factors in both confession and guilty plea settings).

[138] Drizin & Leo, *supra* note 13, at 912–14.

[139] *Compare* United States v. Jacques, 744 F.3d 804, 807–09 (1st Cir. 2014) (holding suspect's confession admissible despite officer exaggerating strength of evidence against suspect during interrogation), *with* United States v. Showalter, 569 F.3d 1150, 1155 (9th Cir. 2009) (holding defendant not allowed to withdraw guilty plea despite prosecutor exaggerating strength of evidence against defendant), *and* Bibas, *supra* note 137, at 2467, 2469 (arguing the common process by which the prosecutor exaggerates the strength of the evidence against the defendant can induce a false guilty plea), *and* Drizin & Leo, *supra* note 13, at 912–14 (arguing the common process by which the interrogator exaggerates the strength of the evidence against the suspect can induce a false confession).

[140] *See* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 204 (2002) (explaining the rational decisionmaking process of defendants who falsely plead guilty under psychological pressure); Ofshe & Leo, *supra* note 53, at 1001–77, 1117 (explaining rational decisionmaking process of suspects who falsely confess under psychological pressure).

powerful promise of leniency.[141] A second shared situational risk factor is the veil of secrecy these manipulative pressures take place behind.[142] When a suspect confesses, his entire interrogation is rarely videotaped.[143] The secrecy in a plea agreement comes instead from the absence of a lengthy record from trial, which can similarly conceal and prevent scrutiny of the factors that resulted in the defendant's choice to plead guilty.[144] And although the defendant has their own defense attorney to provide guidance during plea discussions, in some instances these attorneys have incentives to plead their clients guilty to stay on top of their burdensome caseloads.[145]

Furthermore, the personal risk factors that give rise to false guilty pleas parallel those that result in false confessions.[146] For example, juvenile or mentally ill defendants' immaturity and poor decision-making skills can

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[141] *See* FED. R. CRIM. P. 11(c) (explaining plea agreement procedure); Emily Rubin, Note, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699, 1715–16 (1994) (arguing that there is coercion inherent in plea bargaining itself because both innocent and guilty suspects are tempted to accept offers rather than risk trial).

[142] Miranda v. Arizona, 384 U.S. 436, 445, 448 (1966) (referring to the problem of secrecy in police interrogations); Bibas, *supra* note 137, at 2493–96 (commenting on the secrecy in the plea agreement context).

[143] Johnson, *supra* note 52, at 720. As of March 2019, Colorado, Connecticut, Illinois, Kansas, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, Vermont, Wisconsin, and the District of Columbia have enacted legislation regarding the recording of custodial interrogations. *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, https://www.innocenceproject.org/false-confessions-recording-interrogations/ [https://perma.cc/TY54-JVBE]. State supreme courts have taken action in Alaska, Indiana, Iowa, Massachusetts, Minnesota, New Hampshire, and New Jersey. *Id.* Although state legislatures and state supreme courts have required videotaping, it is still rare that the *entire* interrogation is recorded. GARRETT, supra note 35, at 28 (finding none of the interrogations of exonerees who falsely confessed were recorded in their entirety). Furthermore, videotaping interrogations is only a reform when the interrogator is visible in the footage. *False Confessions & Recording of Custodial Interrogations*, *supra* (finding when only the suspect is visible, jurors typically find the confession was not coerced, even when it is actually false because they cannot take the interrogator's appearance into consideration).

[144] *See* Bibas, *supra* note 137, at 2493–96 (analyzing innocent guilty pleaders' lack of information about the merits of their case in the absence of trial). For example, a defendant who chooses to plead guilty foregoes the opportunity to challenge any alleged eyewitnesses the prosecutor would have called at trial. *See* McCoy, *supra* note 127, at 71–72 (noting every guilty plea results in foregoing trial).

[145] Rubin, *supra* note 141, at 1715–16 (arguing the incentives at play in a plea-bargaining system encourage poor representation). For private attorneys, plea bargaining can sometimes be a means to quickly dispose of cases to remain profitable. Hessick & Saujani, *supra* note 140, at 208. Although the income of public defenders, who are salaried employees of the state, does not depend on the number of cases they dispose of, many of their jobs depend upon staying on top of an extraordinary number of cases every year. *Id.* at 209.

[146] Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 49, 60 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

influence their decision to accept plea offers despite their innocence.[147] Innocence itself can also put defendants at risk for falsely pleading guilty, in part because innocent defendants do not have any firsthand knowledge of the crime or evidence against them.[148] Ultimately, plea agreements have been widely criticized by scholars in the field for producing false confessions for many of the same reasons that promises of leniency in interrogations have been found to produce false confessions.[149]

B. The Disparity in Treatment of Promise-Induced Admissions of Guilt

1. Perception of Promise-Induced Guilty Pleas

Despite their similarities, laypeople and actors within the criminal justice system are more open to conceding that the promises integral to plea agreements are coercive because such a concession does not invalidate the rationale behind using guilty pleas to convict.[150] Whereas promise-induced confessions in interrogations ascertain their strength and legitimacy from the notion that an innocent suspect is unlikely to admit guilt, promise-induced guilty pleas in plea discussions are embraced as an economic necessity to alleviate overburdened criminal dockets.[151] Therefore, despite misplaced

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[147] Redlich et al., *supra* note 137, at 82 (studying 1,249 offenders with mental illness and concluding mental illness puts defendants at risk for false confessions and false guilty pleas); *see* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 945–46, 952 (2010) (finding innocent juveniles more likely than innocent adults to falsely confess or plead guilty).

[148] Bibas, *supra* note 137, at 2494. In the absence of enough knowledge about the evidence against them, it is difficult for defendants to analyze whether a trial would be too great a risk, especially when the prosecutor exaggerated the evidence against them. *Id.* at 2467, 2469 (arguing the common process by which the prosecutor exaggerates the strength of the evidence against the defendant can induce a false guilty plea).

[149] Redlich, *supra* note 146, at 60 (finding the mentally ill more vulnerable to false confessions and false guilty pleas); Bibas, *supra* note 137, at 2467, 2469 (finding psychological coercion and innocence in plea discussions contributes to risk of false guilty plea); Drizin & Leo, *supra* note 13, at 912–14 (finding that psychological coercion in interrogations contributes to the risk of false confession); Kassin & Norwick, *supra* note 67, at 218 (explaining why actual innocence heightens risk of falsely confessing); Redlich, *supra* note 147, at 953 (finding juveniles, in comparison to adults, more vulnerable to false confessions and false guilty pleas).

[150] *See* Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 894–95, 895 n.40 (1980) (explaining economic rationale behind the wide use and acceptance of plea bargaining).

[151] *See* Kassin & McNall, *supra* note 53, at 233–51 (studying the public understanding of confession testimony); H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 L. & CONTEMP. PROBS. 102, 105 (1977) (explaining economic necessity of guilty plea system). The notion that innocent suspects do not confess is fostered by the public's inability to detect, comprehend, and properly weigh such promises. *See* Kassin, *supra* note 15, at 228–29 (commenting on the general population's inability to understand the coercive effects associated with promises of leniency in interrogation setting); Kassin & McNall, *supra* note 53, at 234 (finding that direct promises are more often excluded than implied promises because they are easier to identify); Kas-

trust in promises of leniency to elicit truthful confessions, people can be more openly skeptical of our system's reliance on promises of leniency to elicit truthful guilty pleas.[152]

And although they interact with many of the same other situational and personal risk factors, promises of leniency made during plea discussions are easier to detect and their psychological effects are easier to understand.[153] Promises of leniency made during plea discussions may be easier to detect because they are made explicitly in open court and are legally enforceable.[154] Additionally, most people versed in criminal law have an elementary understanding that because of the discrepancies between possible punishments under sentencing schemes in the United States, prosecutors' offers are inherently coercive to any rational defendant who calculates how much he wants to risk.[155]

Studies show the public's understanding of the coercive nature of promises in plea bargaining, as well as other commonly held beliefs, have actually led many to view plea bargaining with suspicion and distaste in striking contrast to their inability to detect, comprehend, and properly weigh

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sin & Wrightsman, *supra* note 72, at 82–85 (remarking on the difficulty in discounting confessions induced by promises of leniency). Plea bargaining is instead justified in economic terms. *See* Chief Justice Warren E. Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) (noting that criminal justice system costs would double if guilty pleas were reduced to making up 80% of all criminal cases, and costs would triple if they were reduced to 70%); Uviller, *supra*, at 105 (explaining economic costs of trial require guilty pleas to make up at least ninety percent of all criminal cases).

[152] Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85, 95 (1989) (using a Gallup poll to test public attitudes in Canada and finding that most Canadians disapprove of plea bargaining); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 149 (1992) (discussing studies that have shown that most Americans and Canadians disapprove of plea bargaining). The public is simultaneously concerned that the plea-bargaining system punishes the innocent and lets the guilty off too lightly. *See* Patricia A. Payne, *Plea Bargaining: A Necessary Evil?*, *in* CRITICAL ISSUES IN CRIME AND JUSTICE 232, 232 (Albert R. Roberts ed., 1994) (describing common public concerns regarding plea bargaining).

[153] Kari Lindberg, *More People Are Pleading Guilty to Crimes They Didn't Commit, So How Can We Stop It?*, REWIRE (Feb. 8, 2017), https://rewire.news/article/2017/02/08/people-pleading-guilty-crimes-didnt-commit-can-stop/ [https://perma.cc/JM82-9HP5] (commenting on the public awareness of false guilty pleas).

[154] FED. R. CRIM. P. 11(c)(1) (stating that the terms of a plea agreement must be recited in open court); *see supra* note 136 and accompanying text (explaining the availability of a legal remedy for the government's breach of a plea agreement).

[155] *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1342, 1346 (1997) (explaining public understanding that an innocent and rational defendant may plead guilty to receive a lesser sentence rather than risk the greater sentence that would accompany erroneous conviction); Lindberg, *supra* note 153 (finding popular culture has helped raised public awareness of innocent people who have taken guilty pleas).

promises in interrogations.[156] Demands for reform have been fierce, and some critics even call for removal of the plea bargaining system entirely.[157]

2. Stricter Constraints on Plea Bargaining

Because of the distaste that arises from a better understanding and willingness to acknowledge the coercive nature of promises in the plea discussion context, defendants who plead guilty after being promised leniency in plea discussions are afforded greater procedural safeguards than suspects who confess after being promised leniency in interrogations.[158] In essence, defendants susceptible to similar situational and personal risk factors who are induced by a promise of leniency to admit to a crime they did not commit receive disparate treatment in our criminal justice system.[159]

The chief procedural safeguard afforded to defendants who choose to plead guilty is the requirement that their plea is knowing and intelligent,

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[156] *See* Cohen & Doob, *supra* note 152, at 95 (using a Gallup Poll to expose the common skepticism of our system's reliance on promises of leniency to elicit truthful guilty pleas); Payne, *supra* note 152, at 232 (describing common public concerns regarding plea bargaining including that it sometimes punishes the innocent); Roberts, *supra* note 152, at 149 (discussing studies that have shown that most Americans and Canadians do not support plea bargaining); *see also supra* note 152 and accompanying text (explaining the common skepticism of our system's reliance on promises of leniency to elicit truthful guilty pleas).

[157] *See generally* Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 L. & SOC'Y REV. 393 (1979) (studying the potential consequences abolishing plea bargaining would have on firearm statute); Otwin Marenin, *The State of Plea Bargaining in Alaska*, ALASKA JUST. F., Spring 1990, at 1, 1 (studying the effect of the Alaska Attorney General's partial ban on plea agreements in 1975); Michael L. Rubinstein & Teresa J. White, *Alaska's Ban on Plea Bargaining*, 13 L. & SOC'Y REV. 367 (1979) (studying Alaska's partial ban on plea bargaining); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987) (studying abolition of plea bargaining in a Texas county).

[158] *Compare Miranda*, 384 U.S. at 444 (holding that prior to any custodial interrogation, the person must be sufficiently warned of their rights), *and* Schulhofer, *supra* note 75, at 867–69 (analyzing development of Supreme Court's due process "voluntariness" test that prevents the admission of involuntary confessions at trial), *and supra* notes 103–125 (explaining safeguards for defendants who confess), *with* FED. R. CRIM. P. 11(b)(1) (governing required contents of plea colloquy between judge and defendant before guilty plea is accepted), *and* Brady v. United States, 397 U.S. 742, 748 (1970) (holding guilty pleas and accompanying waivers of constitutional rights must be "voluntary" and "knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences"), *and infra* notes 160–172 (explaining stricter safeguards for defendants who plead guilty).

[159] *See Brady*, 397 U.S. at 748 (holding guilty pleas must be "voluntary" and "knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences"); Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding a confession must be voluntary to be admissible under the Fourteenth Amendment's Due Process Clause, which requires state action to be "consistent with the fundamental principles of liberty and justice"); *see also supra* notes 103–125 (explaining safeguards for defendants who confess); *infra* notes 160–172 (explaining stricter safeguards for defendants who plead guilty).

voluntary, and based in fact.[160] First, a knowing and intelligent agreement is one in which the defendant understands the charge, the possible sentences, and the rights waived as a result of the accepted plea.[161] In order to understand the charge, the defendant must also comprehend its material elements.[162] Understanding the consequences of the plea entails the defendant's full comprehension of the minimum and maximum sentences as well as applicable sentencing guidelines that the judge might be required to

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[160] See FED. R. CRIM. P. 11(b)(1) (governing required contents of plea colloquy between judge and defendant before guilty plea is accepted); *Brady*, 397 U.S. at 748 (holding guilty pleas and accompanying waivers of constitutional rights must be "voluntary" and "knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences"); *Boykin*, 395 U.S. at 242 (holding trial judge's acceptance of petitioner's guilty plea without affirmative showing that it was intelligent and voluntary was erroneous). Because a guilty plea will generally operate as a waiver of several constitutional rights, the standard for a waiver is concomitant with the standard for accepting a plea of guilty. *See, e.g.*, United States. v. Davis, 689 F.3d 349, 355 (4th Cir. 2012) (refusing to enforce an appeal waiver where defendant was incorrectly told both in his plea agreement and at his plea hearing that he faced only a ten-year sentence because the misinformation prevented the waiver from being a "knowing" one); United States v. Manigan, 592 F.3d 621, 627 (4th Cir. 2010) (holding appellate waiver was valid where the defendant voluntarily, knowingly and intelligently agreed to it); *Scott*, 419 F.2d at 274 (holding guilty plea and accompanying waiver of constitutional rights must be voluntary, knowing and understanding). Essentially, by entering a plea of guilty, a defendant waives all non-jurisdictional challenges to constitutionality of the conviction, and only an attack on voluntary and knowing nature of plea can be sustained. *See* Menna v. New York, 423 U.S. 61, 62–63 n.2 (1975) (reasoning that guilty pleas establish reliable admission of factual guilt, and thus make any constitutional violations regarding factual guilt irrelevant).

[161] *See Brady*, 397 U.S. at 748 (holding guilty pleas must be knowing and intelligent); McCoy & Mirra, *supra* note 150, at 899 (explaining due process concerns in admissibility of a knowing and intelligent guilty plea).

[162] *See Bousley*, 523 U.S. at 618, 626 (holding that a plea is intelligent if the defendant receives "real notice of the true nature of the charge against him"); *see, e.g.*, Bradshaw v. Stumpf, 545 U.S. 175, 182–83 (2005) (holding a plea was knowing despite defendant's post-sentencing claim he did not understand specific intent requirement for aggravated murder because at plea hearing defense attorneys represented they explained elements of charge and defendant confirmed this was true); United States v. McMullin, 568 F.3d 1, 9–10 (1st Cir. 2009) (holding that a plea was knowing despite defendant's claim he would not have plead guilty upon realizing the definition of "unlawful user" because the court clearly explained elements of offenses); *In re* Sealed Case, 283 F.3d 349, 354–55 (D.C. Cir. 2002) (holding a plea knowing despite the trial court's failure to explain every element of the crime because the court informed defendant of straightforward conspiracy charge, counsel advised him throughout, and defendant used term "conspired" in court). *But see* Henderson v. Morgan, 426 U.S. 637, 638, 647 (1976) (holding defendant's guilty plea to second degree murder involuntary because he did not receive adequate explanation of the crime's "critical" mens rea requirement); United States v. Bradley, 381 F.3d 641, 647 (7th Cir. 2004) (plea not intelligent if everyone involved misunderstood nature of charges); United States v. Villalobos, 333 F.3d 1070, 1075–76 (9th Cir. 2003) (holding plea not intelligent because defendant was not informed drug quantity had to be proved beyond reasonable doubt). The requirement that a defendant comprehend the critical elements of the charged crime is intended to ensure that the defendant knows what facts the government will have to prove if he pleads not guilty and thus can make a fully informed decision as to whether he would be better off accepting the agreement or going to trial in hopes the government cannot prove those facts beyond a reasonable doubt. United States v. Minore, 292 F.3d 1109, 1115 (9th Cir. 2002).

abide by.[163] Finally, the defendant must comprehend the rights waived as a result of accepting a plea, which are different than the rights denied as a result of conviction.[164] For example, the loss of the right to vote in some states is not directly related to pleading guilty, but instead a consequence of being convicted of a serious crime.[165]

Second, a voluntary plea is one that is not coerced by the state.[166] A plea may be considered involuntary if it is the result of either psychological

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[163] *See, e.g.*, Montoya v. Johnson, 226 F.3d 399, 407 (5th Cir. 2000) (plea was knowing despite the defendant's belief that his state and federal sentences would run concurrently because the defendant was informed his agreement was binding only on the state court); United States v. Kellum, 42 F.3d 1087, 1097 (7th Cir. 1994) (holding cocaine distribution conspirator's guilty plea was knowing and voluntary in part because court reviewed the consequences of his guilty plea including possible minimum and maximum penalties); Richardson v. United States, 577 F.2d 447, 452 (8th Cir. 1978) (holding a defendant's guilty plea to conspiracy in a drug related offense was knowing in part because he was advised that possible maximum consequence of guilty plea would be imprisonment for 15 years followed by a minimum special parole term of three years). *But see, e.g.*, United States v. Castro-Gómez, 233 F.3d 684, 687 (1st Cir. 2000) (holding plea not knowing because defendant was not informed he faced mandatory life sentence).

[164] FED. R. CRIM. P. 11(b)(1)(N); *see, e.g.*, Libretti v. United States, 516 U.S. 29, 51 (1995) (holding defendant's guilty plea was knowing because defendant acknowledged that he waived various constitutional rights, including right to jury trial on forfeiture issue); United States v. Edgar, 348 F.3d 867, 872 (10th Cir. 2003) (holding defendant's guilty plea to unlawful possession of a firearm was knowing and voluntary in part because his signed agreement expressly stated he had discussed with counsel his waiver of the right to appeal or challenge collaterally his conviction or sentence). *But see* Hanson v. Phillips, 442 F.3d 789, 799 (2d Cir. 2006) (holding plea was not knowing because court failed to explicitly inform defendant he was giving up right to trial); United States v. Robinson, 187 F.3d 516, 517–18 (5th Cir. 1999) (same); Hill v. Beyer, 62 F.3d 474, 482–84 (3d Cir. 1995) (same).

[165] *Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/Q4GN-BJZX].

[166] *Brady*, 397 U.S. at 755 (holding guilty plea invalid if induced by promises or threats which deprive the plea of its voluntariness); Machibroda v. United States, 368 U.S. 487, 493 (1962) (same). The voluntariness standard in the plea-bargaining context has been characterized as "exceedingly ambiguous" and different than voluntariness standards in other contexts. Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1425 (2016) (noting the voluntariness analysis in plea bargain context is different than in confession context in part because the Supreme Court recognizes the threat of punishment in interrogations as coercive, but does not find the inherent threat of more severe punishment post-trial as coercive); Loftus E. Becker, *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 760–72 (1988) (arguing Supreme Court's cases on voluntariness in the guilty plea context are ambiguous and never fully developed the prohibition on government inducements likely to cause innocent defendants to plead guilty). For example, threatening a suspect with a harsher sentence during an interrogation is treated differently than giving the same threat during plea bargaining. *See* Garrett, *supra*, at 1425 (providing examples of how the voluntariness standard differs in the plea discussion context from the interrogation context). Furthermore, in *Kercheval v. United States*, the first Supreme Court case to address the standards governing guilty pleas, the Supreme Court failed to even mention *Bram v. United States*, the then leading case on coerced confessions. *See generally* Kercheval v. United States, 274 U.S. 220 (1927) (failing to cite *Bram v. United States* while discussing coerced confessions); *see also* Bram v. United States, 168 U.S. 532, 542 (1897) (deciding how to treat coerced confessions in the first instance).

or physical pressure and therefore the defendant must confirm the absence of coercion.[167] Lastly, the requirement that a plea agreement is based in fact means it must be premised on conduct that actually took place and serves as a theoretical prohibition against defendants pleading guilty to crimes they did not commit.[168] This requirement ensures that defendants are not punished in the absence of culpability.[169]

Secondary procedural safeguards intended to prevent false guilty pleas include the Sixth Amendment right to counsel.[170] Defendants may also set

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[167] *See, e.g.*, United States v. Adams, 746 F.3d 734, 746 (7th Cir. 2014) (holding defendant's guilty plea was voluntary in part because he stated he had not been forced, threatened, coerced, or intimidated into pleading guilty). Where a guilty plea is the result of threats causing the defendant a justified fear of harm to himself and family, his plea may be involuntary. United States v. Colson, 230 F. Supp. 953, 958–60 (S.D.N.Y. 1964). Promises of leniency to a third party do not per se render a plea involuntary. United States v. Spilmon, 454 F.3d 657, 658–59 (7th Cir. 2006) (holding plea voluntary because agreement exempting defendant's wife from prosecution not unduly coercive); Sanchez v. United States, 50 F.3d 1448, 1455 (9th Cir. 1995) (holding plea voluntary despite promise not to prosecute defendant's wife if he plead guilty because defendant's statements indicated plea entered for other reasons); United States v. DeFusco, 949 F.2d 114, 119 (4th Cir. 1991) (plea voluntary despite defendant's wife being promised leniency as part of plea). *But see, e.g.*, United States v. Abbott, 241 F.3d 29, 34–35, 37 (1st Cir. 2001) (plea not voluntary where linked to favorable plea agreement for defendant's mother because government failed to bring linked pleas to judge's attention and judge could therefore not adequately decide whether defendant plead guilty voluntarily or to save mother). But because suspects generally plead guilty with the expectancy of receiving more lenient treatment than the worst post-trial outcome, this promise alone is typically not enough to make the plea involuntary. *See* WRIGHT ET AL., *supra* note 128, § 180 (explaining prosecutors have substantial discretion in determining contents of plea agreements); *see also* United States v. Araiza, 693 F.2d 382, 384 (5th Cir. 1982) (holding inducement to plead guilty based on the terms of the plea agreement itself does not render the plea involuntary or coerced).

[168] FED. R. CIV. P. 11(f); *see* United States v. Alber, 56 F.3d 1106, 1110 (9th Cir. 1995) (holding the factual basis requirement does not require proof beyond a reasonable doubt, but rather that it is met when there is reasonable basis to conclude each of the elements in the charge has been met); *see, e.g.*, United States v. Marks, 38 F.3d 1009, 1012 (8th Cir. 1994) (holding factual basis established for defendant's plea of guilty to charge of conspiracy to distribute cocaine because he admitted to receiving phone calls from buyers and helping his co-conspirators "achieve their goals"); United States v. Montoya-Camacho, 644 F.2d 480, 486 (5th Cir. 1981) (holding adequate factual basis existed for defendant's guilty plea to charge of conspiracy to transport aliens illegally within United States because he admitted he knew he was helping aliens cross the Rio Grande river in violation of the law). *But see* Alessi v. United States, 593 F.2d 476, 480 (2d Cir. 1979) (holding insufficient factual basis for accepting petitioner's pleas of guilty to charging income tax evasion where there was no showing that the Government could prove concealment).

[169] *See* United States v. Romanello, 425 F. Supp. 304, 309 (D. Conn. 1975) (noting actual basis requirement is intended to prevent false pleas, rather than involuntary ones, and thus does not affect the voluntary analysis).

[170] *See Lafler*, 566 U.S. at 169–70 (declaring right to effective assistance of counsel during plea bargaining in a case involving assault with intent to murder); *Frye*, 566 U.S. at 144 (declaring right to effective assistance of counsel during plea bargaining in a case involving repeatedly driving with a revoked license). It is immaterial whether the defendant later loses at trial. *Lafler*, 566 U.S. at 169; *Frye*, 566 U.S. at 138–40. In *Frye*, the defendant was charged with the felony of repeatedly driving with a revoked license and the prosecution sent his defense counsel two plea bargain offers. 566 U.S. at 138–40. The defendant's counsel never told him about the offers and

aside their guilty plea as involuntary if they were prejudiced by prosecutorial misconduct.[171] Lastly, a defendant who enters into plea discussions but

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he subsequently plead guilty without an underlying offer and was sentenced to three years in prison. *Id.* The Supreme Court vacated his conviction and remanded after finding defense counsel had the duty to communicate plea offers from the prosecution that may benefit the accused, and the defendant's counsel was deficient for failing to do so. *Id.* at 149–51. In *Lafler*, the defendant was charged with several offenses, including assault with intent to murder, and rejected a guilty plea based on the advice of his defense counsel. 566 U.S. at 161. The Supreme Court reviewed his petition for habeas corpus and held he was prejudiced by counsel's deficient performance in advising him to reject the plea offer and go to trial, and the proper remedy was ordering the State to reoffer the plea agreement. *Id.* at 174. Now, a defendant may seek to undo a guilty plea and resulting conviction by claiming he received poor legal representation during the plea bargain process. *See generally id.* (holding a defendant may seek to undo a guilty plea and resulting conviction for inefficient assistance of counsel); *Frye*, 566 U.S. 134 (holding defendant entitled to State reoffering plea agreement to remedy counsel's deficient performance in advising him to reject plea offer); *see also* United States v. Batamula, 788 F.3d 166, 171–72 (5th Cir. 2015), *aff'd en banc*, 823 F.3d 237 (2016) (remarking "providing counsel to assist a defendant in deciding whether to plead guilty is [o]ne of the most precious applications of the Sixth Amendment"). When a convicted defendant challenges his guilty plea on the grounds that he was denied his Sixth Amendment right to effective assistance of counsel, he must show that his counsel's representation fell below an objective standard of reasonableness and he must show that the deficient performance prejudiced the defense by showing that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (articulating ineffective assistance of counsel standard); United States v. Weeks, 653 F.3d 1188, 1201 (10th Cir. 2011) (holding defendant received ineffective assistance of counsel because counsel failed to properly advise him that lack of intent provided a valid defense to conspiracy charge). *But see* United States v. Horne, 987 F.2d 833, 835–36 (D.C. Cir. 1993) (holding defendant received effective assistance of counsel absent proof that but for counsel's erroneous estimate of applicable Sentencing Guidelines, defendant would have pursued trial because he was warned of statutory maximum).

[171] *Brady*, 373 U.S. at 86. Prosecutorial misconduct sufficient to render a guilty plea involuntary includes a prosecutor's nondisclosure of exculpatory evidence or misrepresentation of plea bargaining procedure. *See id.* (holding prosecutor's failure to disclose exculpatory evidence violates Fourteenth Amendment's right to due process and a fair trial); *see also* Kyles v. Whitley, 514 U.S. 419, 453–54 (1995) (finding the question of whether a failure to disclose exculpatory evidence prevented a fair trial depends not on whether the state would have had a case to go to the jury if it had disclosed the favorable evidence, but whether the jury's verdict would have been the same); United States v. Bagley, 473 U.S. 667, 682 (1985) (holding evidence withheld by government is "material," as would require reversal of conviction, if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different); *see, e.g.*, Giglio v. United States, 405 U.S. 150, 154–55 (1972) (holding prosecutor's nondisclosure of promise to key witness violated due process and required new trial); Ferrara v. United States, 456 F.3d 278, 297–98 (1st Cir. 2006) (setting aside the verdict and vacating the sentence because there was reasonable evidence defendant would have opted for trial if prosecution had not withheld exculpatory evidence); United States v. Reyes, 313 F.3d 1152, 1158–59 (9th Cir. 2002) (Allowing defendants to withdraw pleas because prosecutor led them to believe pleas could be withdrawn if court did not follow recommended sentencing range); Miller v. Angliker, 848 F.2d 1312, 1321–22 (2d Cir. 1988) (allowing defendant to challenge voluntariness of plea because prosecution withheld material exculpatory evidence that another person was seen near victims and arrested for assault). *But see* United States v. Kates, 174 F.3d 580, 583 (5th Cir. 1999) (per curiam) (holding that a defendant was not allowed to challenge a plea as involuntary even though the government knew that a potential witness had changed their story and failed to disclose it because the testimo-

later decides to go to trial is shielded by Federal Rule of Criminal Procedure 11(f), which ostensibly renders most statements made by an accused during plea negotiations with the prosecutor inadmissible.[172]

III. A Proposed Jury Instruction on Promise-Induced Confessions

The parallels between the risk factors that heighten the chance of a wrongful conviction in both interrogation and plea discussion settings, including promises of leniency, demand certain reforms should be enacted in the interrogation setting.[173] Section A of this Part advocates that there should be equivalent safeguards for the suspect who confesses and defendant who

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ny was neither material nor exculpatory); United States v. Avellino, 136 F.3d 249, 258 (2d Cir. 1998) (holding defendant not allowed to challenge plea as involuntary despite government's failure to produce evidence key witness had perjured himself at other trials because such evidence not material to prosecution of defendant); Nguyen v. United States, 114 F.3d 699, 705 (8th Cir. 1997) (holding that a defendant was not allowed to challenge plea as involuntary even though the government had allegedly withheld exculpatory books and records from the defendant's own company because the defendant was presumably familiar with the materials and the defendant's statements at a plea hearing established guilt); United States v. Bouthot, 878 F.2d 1506, 1512 (1st Cir. 1989), *abrogated on other grounds by* Perry v. New Hampshire, 565 U.S. 228 (2012) (holding defendant not allowed to challenge state court guilty plea as involuntary because state prosecutor's failure to disclose existence of ongoing federal investigation not misrepresentation).

[172] FED. R. CRIM. P. 11(f); FED. R. EVID. 410. Rule 11(f) sets forth the circumstances under which pleas, offers of pleas, and related statements are admissible against a defendant at trial by simply referring to Rule 410 of the Federal Rules of Evidence. FED. R. CRIM. P. 11(f); FED. R. EVID. 410. Rule 410 regarding pleas, plea discussions, and related statements states:

> (a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea. (b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4): (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

FED. R. EVID. 411. The Notes of the Advisory Committee suggest that admitting a defendant's withdrawn guilty plea would produce a dilemma inconsistent with allowing the defendant a trial. FED. R. EVID. 410 advisory committee's note to 1972 proposed rule. For instance, admitting a withdrawn guilty plea might compel the defendant to take the stand to explain it, thereby allowing the prosecution to call the lawyer who represented the defendant when he or she entered the plea. *Id.*

[173] *See* Bibas, *supra* note 137, at 2467, 2469 (explaining situational risk factors in guilty plea context); Drizin & Leo, *supra* note 13, at 912–14 (explaining situational risk factors in confession context); Redlich et al., *supra* note 137, at 82 (explaining personal risk factors in both confession and guilty plea settings).

pleads guilty in response to a promise.[174] Section B of this Part provides the content of a potential jury instruction that could protect against jurors' erroneous convictions based on false confession testimony by preventing jurors from giving promise-induced confessions undue weight.[175] Section C of this Part examines how this instruction would have affected the trial of an exoneree who falsely confessed after being promised he could go home if he did so.[176]

A. Closing the Gap Between Different Procedural Safeguards Governing Promise-Induced Admissions of Guilt

Because our criminal justice system has openly acknowledged that promises of leniency are coercive in plea discussions where it is easier to detect their presence and understand their effect, it should also be acknowledged that they are similarly coercive in interrogations now that their presence and effect has been revealed by review of common interrogation procedures and relevant psychology.[177] Taking promises of leniency seriously in both contexts means providing equivalent safeguards to prevent wrongful conviction in either scenario.[178] Because cases that involve confessions, unlike those involving a guilty plea, leave open possibility of trial, there are even greater opportunities to implement meaningful procedural safeguards for the former.[179] Typically, when evidence is somewhat counter-intuitive, expert testimony and jury instructions can be employed to aid the fact finder.[180]

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[174] *See infra* notes 177–198 and accompanying text.

[175] *See infra* notes 199–214 and accompanying text.

[176] *See infra* notes 215–231 and accompanying text.

[177] *See* Kassin & Wrightsman, *supra* note 72, at 82–85 (remarking on the misplaced trust in confessions induced by promises of leniency); Kassin, *supra* note 15, at 228–29 (explaining that the general population cannot fathom the coercive effects associated with promises of leniency in interrogation setting); McCoy & Mirra, *supra* note 150, at 894–95, 895 n.40 (offering an economic rationale for why people are freer to concede that the promises integral to plea agreements are coercive).

[178] *See* Drizin & Leo, *supra* note 13, at 996 (arguing that illuminating the risk of wrongful conviction that false confessions impose on the innocent ought to incite demands for reform).

[179] *See* McCoy, *supra* note 127 (noting every guilty plea results in foregoing trial). *See generally* BODENHAMER, *supra* note 129 (providing a history of defendants' rights at trial in state and federal courts).

[180] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993) (interpreting FED. R. EVID. 702 with respect to admissibility of expert testimony); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–53 (1999) (extending *Daubert*'s holding to all expert testimony and other specialized knowledge); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141–43 (1997) (holding rulings on the admissibility of expert testimony will be reviewed for abuse of discretion). In 1993, the Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., ruled that, under Federal Rule of Evidence 702 (Rule 702), a trial judge must make a preliminary assessment of whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and

1. Inadequacy of Expert Testimony on Promises of Leniency

Unfortunately, expert testimony's usefulness in helping jurors better evaluate false confession evidence is accompanied by a myriad of disadvantages.[181] Many state and federal courts still exclude expert testimony on false confessions.[182] Even when experts are allowed to testify, some courts limit their testimony to the general phenomenon of false confessions or the

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can properly be applied to the facts at issue. FED. R. EVID. 702; 509 U.S. at 588. Rule 702 was amended in 2000 to incorporate the holding in *Daubert* and has been amended several additional times since. *See* FED. R. EVID. 702. The rule now provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Id. Limiting jury instructions are instead governed by Federal Rule of Evidence 105, which states: "If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. Once evidence is ruled admissible, the jury may require instructions to further guide their evaluation of such evidence to ensure the jury only considers evidence for relevant purposes but not for impermissible reasons, to inform the jury how particular evidence may be considered or mitigate the prejudicial impact of evidence more generally. *See id.* advisory committee notes to 1972 proposed rule (explaining the intended purpose of Rule 105); *see, e.g.*, United States v. Tail, 459 F.3d 854, 858 (8th Cir. 2006) (finding that an instruction advising the jury that evidence of prior conviction was received for the limited purpose of impeachment decreased any danger of unfair prejudice); United States v. Kennard, 472 F.3d 851, 855, 859 (11th Cir. 2006) (finding that a jury instruction was properly given to guide jury's consideration of evidence of post-indictment flight in criminal fraud trial to avoid unfair prejudice to defendant); United States v. Cropp, 127 F.3d 354, 363 (4th Cir. 1997) (recognizing that when a sequestration order has been violated the jury may be instructed that they may consider the violation toward the issue of credibility).

[181] *See* Chojnacki et al., *supra* note 112, at 39 (arguing empirical analysis demonstrates expert testimony on false confessions enhances jurors' ability to evaluate a defendant's confession by educating them about scientific research that goes beyond their common knowledge); Slobogin, *supra* note 112, at 108 (arguing expert testimony on false confessions assumes we can know things objectively, which has negative impact on criminal defendants by undermining their defenses); *see also infra* notes 182–185 and accompanying text (explaining state and federal courts' positions on the admissibility of expert testimony on false confessions).

[182] *See* United States v. Adams, 271 F.3d 1236, 1246 (10th Cir. 2001) (finding that expert testimony regarding false confession was properly excluded because it infringed on the jury's role in making credibility determinations); Vent v. State, 67 P.3d 661, 670 (Alaska Ct. App. 2003) (finding that expert testimony on the subject of false confessions was properly excluded because the science behind it can be unreliable); State v. Cobb, 43 P.3d 855, 869 (Kan. Ct. App. 2002) (finding expert testimony on false confessions properly excluded because it infringes on the jury's role); State v. Davis, 32 S.W.3d 603, 609 (Mo. Ct. App. 2000) (finding expert testimony was properly excluded because the common knowledge of the jury regarding false confessions was reasonable and unaided by expert opinions); People v. Philips, 692 N.Y.S.2d 915, 939–40 (Sup. Ct. 1999) (finding that the exclusion of an expert witness on interrogation techniques and voluntariness was inadmissible because discussion of detectives' investigation was speculative).

defendant's mental condition, rather than a full explanation of all the relevant factors of a false confession present in the particular defendant's confession.[183] These court decisions mean that experts may not be allowed to testify about the role of promises of leniency in inducing false confessions, even where a promise was made to the particular defendant and even though their coercive effect falls outside the knowledge of most jurors.[184] Lastly, most criminal defendants are indigent and cannot afford expert testimony.[185] Notably, only eight percent of exonerees who falsely confessed were able to use expert testimony at trial.[186]

2. Jury Instructions on Promises of Leniency

In contrast to expert testimony, jury instructions are more widely accepted, less expensive, and can still illuminate how promises of leniency often produce false confessions in ways that contradict jurors' common understandings.[187] Studies show, however, that jury instructions only reduce the rate of conviction when founded on scientific research.[188] The use of instructions that are not founded on science may reduce perceptions of vol-

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[183] *See* United States v. Hall, 93 F.3d 1337, 1344–45 (7th Cir. 1996) (only permitting expert to testify about false confessions generally); United States v. Shay, 57 F.3d 126, 129, 132–33 (1st Cir. 1995) (only permitting expert to testify that defendant suffered from mental disorder which caused him to tell grandiose, self-incriminating lies).

[184] *See Hall*, 93 F.3d at 1344–45 (excluding expert testimony beyond general explanation of false confessions); *Shay*, 57 F.3d at 126 (excluding expert testimony beyond explanation of suspect's mental disorder); Kassin, *supra* note 15, at 221, 228 (finding general population incapable of understanding the coercive effects associated with promises of leniency in interrogation setting); *see also* MCCORMICK, *supra* note 15, at 316 (finding prospective jurors fail to understand the strength of promises of leniency in coercing suspects to confess).

[185] *See* GARRETT, *supra* note 35, at 40 (explaining that judges often deny indigent defendants the funds to hire experts or rule expert testimony on false confessions altogether inadmissible); SMITH & DEFRANCES, *supra* note 7, at 1 (noting that a majority of state and federal prison inmates were indigent at the time of their trials). In *Ake v. Oklahoma*, the Supreme Court held that an indigent defendant has a constitutional due process right to assistance by an expert witness only if its denial would deprive the defendant of a fundamentally fair trial. 470 U.S. 68, 82–83 (1985); *see* Giannelli, *supra* note 7, at 1312–13 (noting that judges have the ability to restrict or deny funding for defense experts).

[186] GARRETT, *supra* note 35, at 40.

[187] *See generally* Jones & Penrod, *supra* note 113 (finding research-based instructions on coercive interrogation techniques may be an effective safeguard against the use of potentially unreliable confession evidence); *see also* Gomes et al., *supra* note 113, at 321 (finding jury instruction on credibility of confessions reduces guilty verdicts); Kassin & Neumann, *supra* note 16, at 481 (finding jurors' common understandings lead them to place more weight on confession evidence than eyewitness or character evidence regardless of its truth or falsity); Sheehan, *supra* note 113, at 674 (arguing that supplanting expert testimony with jury instructions can reduce the time and cost of a trial in the context of eyewitness identifications).

[188] *See generally* Jones & Penrod, *supra* note 113 (finding instructions based on psychological research can influences jurors' verdicts, but instructions without the same foundation merely cause skepticism).

untariness, but are unable to influence jurors' verdicts.[189] For example, instructions concerning the credibility of the defendant and the police appear ineffective.[190] Instructions without a basis in scientific research have similarly fallen short when they focused on voluntariness, reliability, or fairness.[191] On the other hand, research supports the efficacy of using social science-based jury instructions regarding personal and situational risk factors to safeguard against wrongful convictions instigated by false confession testimony at trial.[192]

A sufficient jury instruction designed to prevent wrongful convictions in false confession cases must help the jury detect, comprehend, and properly weigh whether the confession was coerced by a promise of leniency.[193] The instruction should begin by putting promises of leniency in context by explaining they are part of a larger scheme of interdependent situational and personal risk factors.[194] Next, the jury should be given tools to identify both

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[189] *See* Gomes et al., *supra* note 113, at 319 (finding a high rate of conviction was only reduced when participants received scientific information rather than credibility instructions without scientific basis); *see also* Kassin & Wrightsman, *supra* note 92, at 82–83 (finding jury instruction prompted jurors to judge confessions involuntary, but nonetheless return guilty verdicts).

[190] *See* Gomes et al., *supra* note 113, at 319, 323 (finding high rate of conviction not reduced by credibility instruction regarding defendant and police).

[191] *See* Kassin & Wrightsman, *supra* note 92 (finding instructions on voluntariness, reliability, or fairness reduce perceptions of voluntariness but do not reduce conviction rate); *supra* notes 91–94 and accompanying text (explaining that even when people find confessions produced by promises of leniency to be involuntary with the help of a voluntariness instruction, they still improperly rely on that confession in reaching a verdict).

[192] *See generally* Jones & Penrod, *supra* note 113 (finding science-based instructions on false confessions influence jurors' verdicts). Support for science-based instructions to increase jurors' sensitivity to the quality of interrogation procedures has been paralleled in researchers' attempts to increase jurors' sensitivity to the quality of identification procedures in cases with eyewitness testimony. *See* Pawlenko et al., *supra* note 113, at 195 (finding educating jurors about eyewitness identification based on scientific research increases the likelihood of a guilty verdict when quality is high and decreases the likelihood when quality is low). These laboratory results have been replicated in court after the Supreme Court of New Jersey held in *State v. Henderson* that jurors in all cases involving eyewitness evidence must receive instructions intended to assist jurors in evaluating witnessing and identification conditions. *See* 27 A.3d 872, 925–26 (N.J. 2011) (mandating eyewitness identification jury instructions that educate the jury on system and estimator variables that the court has found scientific support for that is generally accepted by experts in the field). *See generally* Jones & Penrod, *supra* note 113 (finding *Henderson* juror instructions on eyewitness identification based on scientific research enhances jurors' skepticism of eyewitness testimony).

[193] *See* Kassin & Wrightsman, *supra* note 72, at 83–94 (explaining jurors' difficulty in discounting confessions induced by promises of leniency); Kassin, *supra* note 15, at 228–29 (commenting on the general population's inability to understand the coercive effects associated with promises of leniency); Kassin & McNall, *supra* note 53, at 234 (finding direct promises were more often excluded than implied promises because they are easier to identify); *see also supra* notes 70–102 and accompanying text (explaining the strong influence promise-induced confessions have in the courtroom on jurors' verdicts).

[194] *See* Gudjonsson, *supra* note 65 (arguing that there are typically four types of psychological vulnerabilities relevant to the evaluation of suspects in criminal cases); Kassin & Gudjonsson,

express and implied promises in interrogation settings and explain permitted inferences in the absence of a video recording.[195] Once the instruction fully enables the jury to identify explicit and implicit promises of leniency and to understand that they are functionally equivalent, it should explain the relevant psychological science to illuminate how promises of leniency can coerce a false confession.[196] Lastly, the jury should be given the tools to weigh the promise of leniency in discounting the reliability of the confession.[197] A jury instruction, if properly written, could ultimately prevent people who are not versed in false confession research from giving disproportionate weight to unreliable confessions and serve as a safeguard against grave miscarriages of justice.[198]

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supra note 32, at 36 (scrutinizing the interrogation methods commonly employed by officers); Leo & Davis, *supra* note 32, at 20 (explaining the stages of false confessions in the criminal justice system); Redlich & Goodman, *supra* note 66, at 151–53 (arguing that youth are more susceptible to making false confessions); *see also supra* notes 50–69 and accompanying text (explaining that false confessions are generally a product of unduly coercive techniques used by law enforcement and personal attributes that increase a suspect's vulnerability to such pressure).

[195] *See* Johnson, *supra* note 52, at 720 (explaining the challenges faced by a criminal defense attorney in defending a client's reliability); Kassin & McNall, *supra* note 53, at 235, 248 (studying the impact of implied promises and threats on suspects' decision to falsely confess as well as on juror's verdicts); Leo et al., *supra* note 68, at 530 (explaining the commonplace credibility battle between a defendant and officer over what was said during an interrogation).

[196] *See* Leo & Davis, *supra* note 32, at 35 (arguing that suspects give serious weight to an interrogator's promises of leniency because they think interrogators have superior knowledge and experience concerning the consequences of confessing); Ofshe & Leo, *supra* note 53, at 1001–77 (explaining that according to rational choice theory, the combination of perceived limited options and consequences, including consequences from promises of leniency, result in suspects' decisions that it is more beneficial to confess than maintain innocence); *see also supra* notes 53–62 and accompanying text (explaining that the implementation of psychological interrogation techniques, including making promises of leniency, can heighten the risk of a false confession).

[197] *See* United States v. Dickerson, 163 F.3d 639, 643 (D.C. Cir. 1999) (finding that the jury may independently assess the proper weight to attribute to a confession); Kassin & Wrightsman, *supra* note 92 (finding juries struggle to properly discount confessions in reaching a verdict); Leo et al., *supra* note 68, at 531 (arguing for a reliability test for the admission of confessions); *see also supra* notes 91–94 and accompanying text (explaining that even when people find confessions produced by promises of leniency to be involuntary with the help of a voluntariness instruction, they still improperly rely on that confession in reaching a verdict).

[198] *See* Kassin & Wrightsman, *supra* note 72, at 87 (finding mock jurors frequently return guilty verdicts despite a confession's falsity in the absence of an instruction that explains the situational and personal risk factors); Kassin & Neumann, *supra* note 16, at 82–83 (conducting mock jury studies to evaluate the comparative impact of confession evidence and finding confession evidence raised the conviction rate more than eyewitness testimony or character evidence). *See generally* Jones & Penrod, *supra* note 113 (finding research-based instructions on coercive interrogation techniques may be an effective safeguard against the use of potentially unreliable confession evidence).

B. The Content of a Jury Instruction on Promises of Leniency in Interrogations

The following jury instruction is intended to mitigate the chance of a wrongful conviction by educating the jury about how to properly detect, comprehend, and weigh promises of leniency when deciding whether a confession is reliable.[199] Because it is not intended to address issues of voluntariness in their own right, the instruction should be preceded by a reminder that in order to even consider the confession in deliberation, the state must prove beyond a reasonable doubt that the statements were in fact made, and that they were made voluntarily.[200]

The skeleton of a model jury instruction on promises of leniency should resemble the following: "Research has shown that there are two types of risk factors for false confessions: the interrogation tactics used by the police (situational risk factors), and the suspect's vulnerabilities (personal risk factors).[201] Therefore, to determine whether the defendant's statements were reliable, you should consider the following: (1) Whether the interrogations were isolated, lengthy, or involved threats and promises; and (2) Whether the defendant is mentally impaired or a juvenile, etc.[202]

A promise of leniency is defined as any assurance given to a suspect that there will be a benefit to confessing.[203] Although you may have seen a video of the interrogation, keep in mind that it is rare that an entire interrogation is recorded, and thus it may exclude an interrogator's alleged promises.[204]

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[199] *See* Kassin & Wrightsman, *supra* note 72, at 83–94 (remarking on the difficulty in discounting confessions induced by promises of leniency); Kassin, *supra* note 15, at 228–29 (commenting on the general population's inability to understand the coercive affects associated with promises of leniency); Kassin & McNall, *supra* note 53, at 234 (finding that people have a greater difficulty identifying implied, rather than express, promises of leniency); *see also supra* notes 70–102 and accompanying text (explaining how confessions produced by promises of leniency ascertain their strength from the public's inability to detect, comprehend, and properly weigh such promises).

[200] *See* Lisenba v. California, 314 U.S. 219, 236, 240 (1941) (holding that the admission of an involuntary confession, but not an unreliable confession, in a criminal trial violates due process); Kassin & Gudjonsson, *supra* note 32, at 56 (noting that juries are expected, implicitly or explicitly, to determine whether a confession was voluntary based on the totality of the circumstances).

[201] *See* Kassin, *supra* note 35, at 114–15 (explaining personal and situational risk factors that heighten the risk of a false confession).

[202] *See id.* (explaining the interrogation procedures and suspects that heighten the risk of a false confession).

[203] *See* Drizin & Leo, *supra* note 13, at 917 (explaining promises of leniency).

[204] *See* GARRETT, *supra* note 35, at 28 (finding that it is rare for an entire interrogation to be recorded); Garrett, *supra* note 14, at 1079 (finding that only 50% of exonerees' confessions were recorded, and none of them were recorded in their entirety). Exoneree Jeffrey Deskovic was subjected to several hours of interrogation throughout multiple sessions, but officers only used a recorder in one session, periodically turned it on and off, and ultimately only recorded 35 minutes. Garrett, *supra* note 14, at 1054–55.

A promise can be explicit, or implied.[205] An explicit promise is defined as an outright guarantee by law enforcement of a certain favorable outcome such as "if you confess, we will drop the charges against your sister," "your confession will allow me to tell the judge you cooperated," or "in exchange for your confession, we will release you from this interrogation."[206] In contrast, an implied promise is defined as a subtler assertion by law enforcement that there will be general benefits such as, "things will be better for you if you confess," "confessing is a good idea," or "if you confess, this process will be easier."[207] Because people often recall information beyond what was clearly said out loud, and instead process information "between the lines," cognitive and linguistic research has found that express and implied promises are equivalent in their coercive impact.[208]

Both implied and express promises of leniency might lead a suspect to rationally conclude that a confession is in his best interest.[209] First, research shows that suspects take officers' promises of leniency seriously because they assume their interrogator has superior knowledge and experience concerning the consequences of confessing.[210] Second, rational choice theory studies demonstrate that suspects therefore rely on these promises in calculating whether it would be more beneficial to confess than maintain their innocence.[211]

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[205] *See Promise*, MERRIAM-WEBSTER ONLINE DICTIONARY (2018), http://www.merriam-webster.com/dictionary/promise [https://perma.cc/M7KF-UWWY] (defining promise to include express and implied declarations that one will do something or refrain from doing something).

[206] *See* Leo & Davis, *supra* note 32, at 35 (arguing suspects rely on interrogators' explicit or implicit promise in deciding whether to confess); *see, e.g.*, United States v. Li Xin Wu, 668 F.3d 882, 886 (7th Cir. 2011) (declaring that a suspect of drug related offenses was not promised immunity, despite his claim to the contrary on appeal, because the suspect did not present any evidence or move to exclude statements at trial); United States v. Montgomery, 555 F.3d 623, 629–30 (7th Cir. 2009) (finding that an officer did not promise a suspect accused of possession of a firearm as a felon that he would not receive a ten year sentence if he confessed because officer's statements were intended to address suspect's concerns that he would be tried on federal rather than state charges).

[207] *See* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 533 (Mass. 2004) (finding that an officer's reference to a suspect's need for counseling was an implicit promise that the interrogator would push for that outcome if the suspect confessed).

[208] *See* Kassin & McNall, *supra* note 53, at 235, 248 (studying the impact of implied promises on suspects' decision to falsely confess and finding implied and explicit promises are equally coercive).

[209] *See* White, *supra* note 106, at 151 (explaining suspects' rational choice to confess in response to promises of leniency).

[210] *See* Leo & Davis, *supra* note 32, at 9 (arguing that suspects give serious weight to an interrogator's arguments and implications that confessions will result in greater leniency).

[211] *See* Ofshe & Leo, *supra* note 53, at 1001–77 (explaining that suspects become persuaded that resistance is either futile or not worth its costs).

The use of any single interrogation tactic or combination of tactics is not proof that the defendant falsely confessed.[212] Instead, you should consider promises of leniency as you assess all of the circumstances of the case, including all of the testimony and documentary evidence, in determining whether the defendant's confession was reliable.[213] Keep in mind that the defendant's recitation of facts during the confession is not necessarily an indication of its reliability because those facts may be the product of an interrogator's intentional or accidental disclosures."[214]

C. The Proposed Jury Instruction in Practice: The Case of Calvin Ollins

A jury instruction which used social science research to advise the jury about how to properly detect, comprehend, and weigh promises of leniency when deciding whether a confession is reliable may have prevented the jury from giving undue weight to Calvin Ollins' confession.[215] The first part of the instruction, designed to place promises within the larger framework of false confession science, would have alerted the jury that this promise interacted with Calvin's other situational and personal risk factors that elevated the probability that his confession was false.[216] Particularly, their attention would have been drawn to his lengthy five hour long interrogation, the threats the officers made to smack him and impose the death penalty, his juvenile status as a fourteen-year-old, and his low IQ.[217]

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[212] *See* Leo et al., *supra* note 68, at 517 (arguing that false confessions are ultimately a product of unduly coercive techniques used by law enforcement and personal attributes that increase a suspect's vulnerability to such pressure).

[213] *See* Kassin, *supra* note 35, at 113–15 (listing interactive factors contributing to suspects' vulnerability).

[214] *See* Garrett, *supra* note 14, at 1053 (reviewing false confession testimony of DNA exonerees and concluding that innocent suspects are informed of public and nonpublic facts of the crime).

[215] *See* Kassin & Wrightsman, *supra* note 72, at 82–94 (remarking on the difficulty in discounting confessions induced by promises of leniency); Kassin, *supra* note 150, at 228–29 (commenting on the general population's inability to understand the coercive effects associated with promises of leniency); Kassin & McNall, *supra* note 53, at 234, 248 (finding that people have greater difficulty identifying implied, rather than express, promises of leniency); *see also supra* notes 70–102 and accompanying text (explaining how confessions produced by promises of leniency ascertain their strength from the public's inability to detect, comprehend, and properly weigh such promises); *supra* notes 201–214 and accompanying text (proposing a jury instruction to aid jurors to better detect, comprehend, and properly weigh promises of leniency when evaluating false confession testimony).

[216] *See Calvin Ollins*, *supra* note 2 (providing factual background that led to Ollins' wrongful conviction); *see also supra* notes 201–202 and accompanying text (providing jury instruction on personal and situational risk factors that heighten the risk of a false confession).

[217] *See* Dellios, *supra* note 2 (reporting Calvin's teachers testified that he was reading at the second grade level and that Calvin was interrogated for five hours before confessing); Possley & Mills, *supra* note 2 (reporting Calvin had an IQ between sixty-five and seventy); *see also supra*

The second part of the instruction, designed to enable juries to better detect both explicit and implicit promises of leniency, would have alerted them to the existence of the officer's promise.[218] At trial, Calvin testified that he confessed *only after* being told it would result in his release.[219] The jury could have compared this to the definition of a promise of leniency as "any assurance that there will be a benefit to confessing," as well as the numerous examples of promises, and concluded that a promise had in fact been made if they credited Calvin's testimony.[220] Regardless of whether the jury thought the promise was explicit or implicit, the instruction would have informed them that research has demonstrated that the two are functionally equivalent in terms of their coercive effect.[221]

The third part of the instruction, designed to help the jury understand how promises of leniency can coerce a false confession, may have helped the jury realize that the officer's promise, and not Calvin's guilt, induced the confession we now know was false.[222] Specifically, they would have realized that Calvin took the promise that he could go home if he confessed seriously, even though it may have seemed ridiculous, because research shows suspects assume their interrogator has superior knowledge and experience concerning the consequences of confessing.[223] In other words, the instruction would have indicated that Calvin was reasonable in relying on

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notes 201–202 and accompanying text (explaining that a lengthy interrogation is a situational risk factor that can heighten the chance of a false confession).

[218] *See* Kassin & McNall, *supra* note 53, at 235, 248 (studying the impact of implied promises and threats on suspects' decision to falsely confess and juror's verdicts); *see also supra* notes 203–208 and accompanying text (proposing a jury instruction that explains how to detect and the coercive effect of explicit and implicit promises).

[219] *See* Dellios, *supra* note 2 (reporting on the circumstances surrounding Calvin's conviction).

[220] *See* Good, *supra* note 112, at 915 (finding that Kansas treats the existence of a promise as a question of fact for the jury to decide); Kassin & McNall, *supra* note 53, at 235, 248 (explaining the ability of jurors to detect implied promises); Ofshe & Leo, *supra* note 53, at 1060–77 (explaining how an officer introduces promises of leniency in an interrogation and providing examples); *see also supra* notes 203–207 and accompanying text (proposing a jury instruction that explains how to detect and the coercive effect of explicit and implicit promises).

[221] *See* Kassin & McNall, *supra* note 53, at 235, 248 (finding explicit and implied promises of leniency have same coercive effect); *see also supra* note 208 and accompanying text (proposing a jury instruction that explains explicit and implicit promises of leniency are functionally equivalent).

[222] *See* Leo & Davis, *supra* note 32, at 9 (arguing that suspects value an interrogator's remarks that their confessions will result in greater leniency); White, *supra* note 106, at 151 (explaining the rational choice involved in confessing when promised leniency); *see also supra* notes 209–213 and accompanying text (proposing a jury instruction that explains how promises of leniency might lead a suspect to rationally conclude that a confession is in his best interest).

[223] *See* Leo & Davis, *supra* note 32, at 9 (arguing suspects give serious weight to an interrogator's arguments and implications regarding why confessions will result in greater leniency); *see also supra* note 210 and accompanying text (proposing a jury instruction that explains why suspects take officers' promise of leniency seriously).

the promise when deciding whether it would be more beneficial to confess rather than maintain his innocence.[224] Furthermore, the jury would have better understood that Calvin made the rational decision that confessing and being able to go home was more desirable than continuing to be subjected to a lengthy interrogation full of threats.[225]

Lastly, the fourth part of the instruction would have reminded the jury to assess the reliability of Calvin's confession in light of the other evidence presented at trial.[226] If the jury had discounted Calvin's confession, the only evidence left at trial would have been Marcellus Bradford's dubious incentivized testimony and the crime analyst's problematic testimony about the vaginal swab test results.[227] The jury may have questioned Bradford's testimony because they heard that it was in exchange for a lighter sentence, and thus could infer he had an incentive to lie.[228] Furthermore, Bradford stated that the motive for the robbery that ended in a brutal rape and murder was getting bus money for Calvin, which seems improbable.[229] And even though the jury did not hear that the "secretor" test actually excluded Calvin, they did hear that it included thirty-seven percent of the male population, which certainly doesn't seem to support a finding of guilt beyond a reasonable doubt.[230] In sum, the proposed jury instruction could alert the jury to promises of leniency and provide the proper scientific research findings to aid them in understanding its coercive effect and weighing the confession in regards to its reliability.[231]

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[224] *See* Leo & Davis, *supra* note 32, at 35 (arguing that suspects give serious weight to an interrogator's arguments and implications regarding why confessions will result in greater leniency); *supra* note 210 and accompanying text (explaining why suspects take officers' promises of leniency seriously).

[225] *See* Ofshe & Leo, *supra* note 53, at 1001–77, 1117 (explaining that suspects become persuaded that resistance is either futile or not worth its costs).

[226] *See* Kassin, *supra* note 35, at 113–15 (listing the strategies officers use to overcome the resistance of a suspect as relevant factors); Leo et al., *supra* note 68, at 517 (listing the unduly coercive techniques used by law enforcement and personal attributes of the suspect as relevant factors); *see also supra* notes 212–214 and accompanying text (proposing jury instruction that informs jury they should consider promises of leniency when they assess all of the circumstances of the case).

[227] *See* White, *supra* note 4, at 1022 (recounting the government's case against Calvin at his first trial); Possley & Mills, *supra* note 2 (reciting evidence used at Calvin's first trial).

[228] *See* White, *supra* note 4, at 1022 (explaining the condition of Marcellus Bradford's guilty plea).

[229] *See id.* at 1023 (explaining the motive that Marcellus Bradford offered to explain the crime).

[230] *See* People v. Ollins (*Ollins I*), 601 N.E.2d 922, 924 (Ill. Ct. App. 1992) (finding the tests performed on vaginal swabs, which included thirty-seven percent of the male population, were properly admitted at trial).

[231] *See generally* Jones & Penrod, *supra* note 113 (finding research-based jury instructions on interrogation procedures minimize the risk of wrongful conviction in false confession cases).

CONCLUSION

Although courts and scholars have long recognized the coerciveness of promises of leniency in the plea-bargaining context, the legal system has yet to acknowledge their effect in the interrogation context despite compelling similarities. Thus, defendants who plead guilty are afforded much greater procedural safeguards than suspects who confess. Considering emerging psychological research, and the fact that DNA testing has exonerated almost 100 convicts who have falsely confessed, it is becoming impossible to ignore that promises can induce innocent suspects to confess to crimes they did not commit. Such developments reveal the disarray among Federal Circuits in analyzing the admissibility of promise-induced confessions, and the disparity in safeguards is unfounded and must be addressed to prevent future wrongful convictions. A jury instruction could help close the gap by illuminating how promises of leniency can produce false confessions in ways that contradict jurors' common understandings. The model instruction provided attempts to convey the relevant scientific and legal principles in a way that will impact jurors' ability to detect, understand, and weigh promises of leniency in evaluating the reliability of a confession.

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